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In The

Supreme Court of the United States

OCTOBER TERM, 1966

No. 792

CITY OF MESA, a municipal corporation,

Petitioner,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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In The
Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

CITY OF MESA, a municipal corporation,

Petitioner,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the judgment and decision of the Arizona Supreme Court entered in the above entitled case July 1, 1966.

(Petitioner, City of Mesa, a municipal corporation, will be referred to herein as "City" and Salt River Project Agricultural Improvement and Power District, an Arizona Agricultural Improvement District, will be referred to as "District." "App....." will designate appendix pages. The initials "A.R." will designate the Abstract of Record.

CITATION TO OPINION BELOW

The Opinion of the Court below is reported as *City of Mesa v. Salt River Project Agr. Imp. & P. Dist.*, ... Ariz. ....., 416 P.2d 187 (1966). (App. A hereto).

JURISDICTION

The judgment and decision of the Arizona Supreme Court was rendered and entered July 1, 1966. Petitioner's Motion For Rehearing was timely filed July 15, 1966 and an Amended Motion For Rehearing was also timely filed under Arizona law September 7, 1966. Petitioner's Petition For Rehearing was denied September 20, 1966, and its Amended Motion on September 26, 1966.

The jurisdiction of this Court is invoked by reason of the provisions of 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Prefatory Note:

The basis, both as to fact and law, of the decision below is not clearcut. The District moved to dismiss the complaint upon the ground that the United States was an indispensable party, which motion the trial court denied. The United States then filed a "Representation of Interest" claiming essentially that the District as a "totality of facilities each integral to the operation of the other" was a reclamation project which was in fact owned by the United States either directly or through its agent, the District. The trial court, without taking any evidence, then dismissed the action upon the ground the United States was an indispensable party.

I. Whether the Reclamation Act of 1902 (32 Stat. 388) as amended and supplemented vests a continuing ownership in the United States in all property, movable or otherwise, acquired by a state-chartered corporation which has taken over the care, operation and maintenance of a reclamation project pursuant to contract with the Secretary of the Interior without regard to

the source of the funds used to acquire such property or the manner in which title has been vested.

II. Whether the limitations upon the doctrine of the sovereign immunity of the United States from suit stated by this Court in *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939), applicable when asserted by or on behalf of a federally-chartered corporation are also applicable when this doctrine is asserted as insulating from suit a state-chartered quasi-municipal corporation with statutory authority "to sue and be sued," which quasi-municipal corporation serves or advances some federal interest and purpose and which makes use of some federally-owned property in conducting some of its business activities.

III. Whether the rule stated in *Land v. Dollar*, 330 U.S.731 (where title to property in suit is not admittedly in the United States and sovereign immunity is asserted as staying the action ownership becomes a question of fact) is also applicable when asserted by or upon behalf of a state-chartered quasi-municipal corporation in a suit involving its business property and it is alleged "that the defendant (such state corporation) is the sole owner of and the sole claimant to the property * * "

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions which are involved will be set forth verbatim in the Appendix:

Arizona Constitution, Article XIII, Sec. 5 (App. B1)

Sections 9-101, 9-231, 9-511, 9-514, 9-515 A, B, 9-516, 9-522 A, 9-523, 9-537 A.R.S. (App. B1-6)

Reclamation Act of 1902, Sections 4, 6, (32 Stat. 388) (App. B5-7)

Reclamation Extension Act of August 13, 1914, Section 5 (38 Stat. 687) (App. B7)

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Moratorium on Construction Charges, Section 8 (47 Stat. 75) (App. B11)

Phoenix Property Acquisition Act (72 Stat. 154) (App. B11-12)

Section 45-937 C, A.R.S. (App. B12)

STATEMENT OF THE CASE[1]

Petitioner, City of Mesa, (hereinafter "City") is a true municipal corporation organized under the general statutes of the State of Arizona (§§ 9-101, 9-231 A.R.S., App. B1-2). As such under the Constitution and statutes of Arizona it is authorized to engage in a public utility business. (Ariz. Const. Art. XIII, Sec. 5, §§ 9-511 et seq. A.R.S. App. B1-6).

Respondent, Salt River Project Agricultural Improvement and Power District (hereinafter "District") is a quasi-municipal corporation organized as such under Arizona statutes with statutory authority "to sue and be sued," (§ 45-937 C, A.R.S., App. B12) characterized by the Arizona Supreme Court as a business corporation and as a corporation engaged in an electric public utility business. *Local 266 International Brotherhood of Electrical Workers v. Salt River etc. Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); *City of Mesa v. Salt River Project Agricultural Imp. & P. Dist.*, 92 Ariz. 91, 97, 373 P.2d 722 (1962).

City has provided an electric utility service to its citizens since 1917. *City of Mesa,* supra. As Arizona has grown so has City. As its corporate limits have been expanded City has

[1]The rule "Whatever was matter of fact in the Court appealed from is matter of fact here," *Hanley v. Donoghue,* 116 U.S. 6 (1895); *Adams v. Saenger,* 303 U.S. 59 (1938) is relied upon by Petitioner since the Arizona Supreme Court, in its opinion, considers many matters generally known to Arizona residents but not formally made a part of the record. Petitioner's statement, however, insofar as matters outside the certified record are material, will be limited to matters of public record, matters recited in Court decisions and to facts published in the widely circulated Annual Report, 1965, of the respondent, Salt River Project.

expanded its electric plant in service to provide needed electric service and to secure needed municipal revenue. In so doing City came into competitive conflict with similar electric service offered by Respondent District. *City of Mesa v. Salt River Project*, 92 Ariz. 91, 373 P.2d 722 (1962).

The history and growth of District may be quickly sketched. Immediately following enactment of the "Reclamation Act" (32 Stat. 388) June 17, 1902, the Secretary of the Interior undertook the formation of a reclamation project incorporating the then irrigated farming areas around Phoenix, Arizona, which was to become generally known as the Salt River Project. An Arizona nonprofit but private corporation, Salt River Valley Water Users' Association, (hereinafter "Water Users") was formed under Arizona territorial statutes (§ 889, Revised Statutes of Arizona 1901) to serve as agent of the landowners who were to become part of and be served by the proposed project.

In 1904 the Secretary entered into a contract with the Water Users dated June 25, and proceeded with the development and construction of this proposed reclamation project. (A.R. Pocket Part).

In 1917 the Secretary turned over the care, operation and management of the facilities as then constructed to Water Users under a written contract (A.R. Pocket Part) under which it was agreed that the Water Users would (a) maintain the condition and capacity of these facilities as "the same is now" at "its own cost and without cost to the United States" but with the right to "construct additional works at its own cost without * * procuring the assent of the Secretary * * " (b) repay to the United States "the cost of the construction, and acquisition otherwise of said project promptly and without default" in the agreed sum of $10,279,190.98 as of January 1, 1917, plus adjustments, up or down, to date of actual turnover (December 1, 1917) by annual installments thereafter; and (c) "the Water Users * * from the time of the taking over of the care, opera-

tion and maintenance of said project thenceforward (shall) have and receive *to its own use and benefit* all the rents, issues, profits, revenue and income, *including all income from power and power privileges* growing out of or arising from the operation and maintenance of the project and every part thereof by it." (Emphasis added)

In 1936 the Arizona Legislature amended the statutes authorizing the formation of Agricultural Improvement Districts enlarging the powers and duties which such corporations might exercise and discharge. (Ch. 10, 12 Leg. Laws 1936, 1st Sp. Sess.).

Immediately thereafter the Water User lands were organized as an Agricultural Improvement District and the District in 1937 entered into a contract with the Water Users which was amended in 1944 and 1949, which contract and amendments were approved by the Secretary of the Interior. (A.R. Pocket Part)

Between 1917 and 1937 the Water Users had greatly expanded the project with the proceeds from sales of its bonds and had built large additional works both for storage of irrigation water and power generation. As is shown by this 1937 contract there was then outstanding $3,049,806.56 still owed the United States as the "Roosevelt Dam Balance." In addition the Water Users had a principal balance outstanding of $12,972,000 on various "Serial Gold Bonds," and owed the Reconstruction Finance Corporation $99,989.03 and an additional anticipated obligation of $6,000,000 as its cost of a new dam on the Verde River—a tributary of the Salt—and spillway improvements to other dams. In addition to the recitals in the 1937 agreement this expansion is reflected in *Orme v. Salt River Valley Water Users Ass'n,* 25 Ariz. 324, 217 Pac. 935 (1923); *Bethune v. Salt River Valley Water Users Ass'n,* 26 Ariz. 525, 227 Pac. 989 (1924); *Reichenberger v. Salt River Project etc.,* 50 Ariz. 144, 70 P.2d 452 (1937).

Under this 1937 contract the District undertook, as agent for

the Water Users, to discharge some of the obligations of the Water Users under its 1904 contract and 1917 contracts with the Secretary of the Interior and became the financing entity of the enterprise for bonding purposes.

This 1937 contract recognized that in 1903 Arizona law did not provide for public corporations or political subdivisions with the privileges and exemptions attendant upon such a status. It recited:

"Whereas, in order to secure for the lands of the Association the above mentioned powers, privileges, rights, exemptions and immunities, * * the Association lands had been organized as an Agricultural Improvement District."

The agreement then provided, by way of further stating its purpose:

" * * * and that the District shall become and be the holder and owner of all properties, real and personal or rights therein purchased, leased or otherwise acquired, necessary or useful to the purposes for which the Association and the District, or either of them, were organized, except such property or rights in property now held or hereafter taken in the name of the United States, and that the District, shall under the authority conferred upon it by Sections 3467 to 3514, inclusive, of the Revised Code of Arizona, 1928, as amended, finance and refinance as its own obligation, the indebtedness of the Association now existing or hereafter incurred by it in exercising the powers and performing the duties assumed by the Association under this Agreement."

The Association also agreed to pay over to the District annually all net revenues received by it and to guarantee all District bonds and other obligations.

In 1949 the District and the Association with approval of the Secretary modified their 1937 agreement, by which modification the District became an operating entity and by the mid 1950's had aggressively embarked upon a sales promotion program designed to build and develop the electric utility business. This

program has been successful. *Salt River Project 1965 Annual Report, p. 27.*

The electric public utility part of the District's business has become its main business. In 1960 (approximately) the District's bonded indebtedness had reached $55,000,000. *(City of Mesa,* supra). At year end 1964 its bonds outstanding amounted to $98,483,000 which bonded indebtedness at year end 1965 had increased to $110,191,000. In 1964 its operating revenues were $42,470,372, and in 1965, $43,552,894. In 1965 its operating revenues were derived $41,838,391 from sales of electric energy, a gain of $1,596,808 over 1964 but only $1,714,503 of said 1965 operating revenues was from "water and irrigation." It served 130,970 electric energy customers at year end 1965, a net gain of 5836 customers over 1964. Residential sales have almost doubled in the period 1960-1965. *Salt River Project 1965 Annual Report.*

In February, 1962, the District became interstate in character by entering into a power agreement with Colorado-Ute Electric Association, a Colorado corporation, to participate at least to the extent of $10,500,000 in construction of a coal-fired generating plant in northwestern Colorado. *Salt River Project 1965 Annual Report notes to combined Financial Statements Note 2, p. 36, Arthur Andersen & Co.; The Western Colorado Power Company v. The Public Utilities Commission of the State of Colorado,* .... Colo. ....., 411 P.2d 785 (1966). At year end 1965, the District had become one of a six member group of private and municipal utilities which were concluding plans for two generating units of 750,000 KW capacity in northwestern New Mexico to cost a total of $150,000,000. *Salt River Project 1965 Annual Report, pp. 12, 13.*

On December 17, 1962, the City Council of the City of Mesa pursuant to the authorization of §§9-511, 9-514, 9-515 A, B, 9-516, 9-522 A, 9-523, 9-537 A.R.S., (App. B1-6) directed the City Attorney to bring a condemnation action to acquire "the

portion of the plant, system and business of the defendant used and useful in rendering electrical utility service in the * * * area within the city limits of the City of Mesa * * * " (Petitioner's Complaint, A.R. 1, 2). The property to be condemned consisted of 11 services, some of them commercial, worth $6500 or in that neighborhood by city estimate and alleged in the complaint to be solely owned by the District. (A.R. 91, 1, 2).

THE FEDERAL QUESTIONS IN THE COURT BELOW

The District moved to dismiss Petitioner's complaint alleging, among other defenses, failure to join the United States, an indispensable party. The contracts of 1904, 1917, 1937 and the 1944 and 1949 amendments were made a part of this motion.

The motion was denied and the District answered the complaint. The United States then filed a "Representation of Interest" incorporating the contracts *supra* by reference and claiming that the District as a reclamation project was constructed and operated under authority of the Reclamation Act of 1902; that the District is made up of a "totality of the project facilities" and that all properties used by the District are owned by the United States and operated by the District as its agent (A.R. 39 et seq.), and that "because of its interest therein (the 11 services)" and in the "totality of the project facilities, the United States is an indispensable party to this action."

On the hearing of Petitioner's Motion to Dismiss this "Representation of Interest" the trial court, without taking any evidence, found the United States to be an indispensable party and dismissed the action.

On appeal to the Arizona Supreme Court Petitioner's Assignments of Error No. 1, 2 and 3, together with the argument in support thereof, were directed to the ruling of the trial court upon these federal questions. (Brief of Appellant, pp. 5, 6, 8-24).

The Brief of Appellee (Respondent) and the Brief of the

United States, Amicus Curiae, revolved almost entirely around the federal questions as did the Opinion and Decision of the Arizona Supreme Court. Petitioner's Amended Motion for Rehearing, filed after the decision of the Arizona Supreme Court, was devoted exclusively to the asserted erroneous conclusions of the Arizona Supreme Court upon these federal questions.

REASONS FOR GRANTING THE WRIT

Summary of Reasons

I. The decision in the Court below construing the Reclamation Act of 1902 (32 Stat. 388) as amended and supplemented, disregards and is at variance with:

1. The intent of Congress that the water users of reclamation projects promptly assume the care, operation and management of the facilities of each project as constructed and thereafter, subject to the obligation to repay the construction charges due to the United States, become substantially independent entities subject only to the requirement that the basic reclamation purpose of the project be respected and advanced. This congressional purpose is clear from (a) the actual language of the Reclamation Act of 1902 and (b) from legislative enactments subsequent thereto.

2. The administrative and judicial construction of the Reclamation Act and its amendments and supplements.

II. The decision of the Court below is in conflict with the guidelines laid down by this Court for determining the validity of the plea of the sovereign immunity of the United States as insulating a corporation, agent or agency serving or advancing some federal purpose from suit when asserted by or on behalf of such entity; and in consequence of disregarding these guidelines the Court below has in effect conferred upon a state-chartered quasi-municipal corporate entity which operates a vast electric public utility business privileges and immunities of the sovereign denied by Congress to "not less than forty" federally-chartered corporations "discharging governmental functions." *(Keifer & Keifer,*

supra, 306 U.S. 381, 391 n. 3); privileges and immunities which applied and extended within the logical limits of the Court's opinion, absent congressional action and control, may put it in many respects beyond all regulation or amenability to judicial process.

III. Because non-federal entities organized by authority granted at and below the state level are receiving increasingly large amounts of federal funds, by grant, loan or otherwise, in aid of an activity presently recognized by Congress as having some federal purpose, it has now become a matter of real and substantial public importance that this Court establish guidelines to be followed by the lower courts when the plea of soverign immunity from unconsented-to suit is asserted as staying the judicial process in litigation involving these state-authorized entities (or properties employed in the discharge of their assigned functions), federal or state.

SUMMARY ARGUMENT

Since the trial court, with the approval of the Arizona Supreme Court, refused to hear any evidence as to the actual title and ownership of the property, the subject of the action, and held the fact it was alleged to be property of an Agricultural Improvement District having the operation of a reclamation project as a function was sufficient to insulate it from suit under the sovereign immunity doctrine it follows that the courts below in fact held that all property of such a District is immune from legal process as property of the United States regardless of the source of funds used in its acquisition or manner in which title thereto was vested. It is but a short step to a holding that the corporation itself is immune from any interference and supervision by the Court.

It was sufficient for the Arizona courts that the project as conceived in 1904 was originally constructed pursuant to the authorization of the 1902 Reclamation Act and that the management of the project has continued under the supervision of the district.

CONGRESSIONAL INTENT AS EVIDENCED BY LEGISLATION

1. Section 4 of the Reclamation Act of 1902 (App. B5-6) as enacted directed the Secretary to estimate the cost of construction of a project and to levy an assessment or charge per acre sufficient to meet this cost "* * * with a view of returning to the reclamation fund the estimated cost of construction of the project." It is not reasonable to conclude that the Congress intended that the landowners were to repay the cost of the project to the Government and yet were not to become the owners thereof—at least as to the major part thereof.

2. By Section 6 (App. B6-7) it was directed that "when the payments required by this act are made by a major portion of the lands irrigated * * * the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby to be maintained *at their expense* * * * " The limitation was then imposed that *"title to* and the management and operation of *reservoirs* and *the works necessary for their protection* shall remain in the Government until otherwise provided by Congress." (Emphasis added.)

3. Section 5 of the Reclamation Extension Act of August 13, 1914, (38 Stat. 687, App. B7) granted the Secretary discretion to turn over the care, maintenance and operation of a project to a water users' group upon request without meeting the requirements of Section 6, *supra.*

4. Subsection G, Section 4 of the "Fact Finders Act," Act of December 5, 1964, Ch. 4, (43 Stat. 672, App. B7-8) required that when two thirds of the irrigable area of a project is covered by water rights contracts the project must be taken over by a water users' group if continued benefits are to be received by the project. (43 Stat. 702, 43 U.S.C. 500).

5. Subsection I of the "Fact Finders Act" (App. B8) provides that whenever water users take over the care, operation and management of a project all accumulated profits shall be credited to the construction charges and all net profits thereafter are to be

applied to (a) payment of construction charges (b) operation and maintenance costs and (c) *as the Water Users direct. "No distribution to individual water users shall be made out of any such profits before all obligations to the Government have been fully paid."* 43 Stat. 703, 43 U.S.C. 501. (Emphasis added.)

6. In 1954 Congress passed the "Title to Movable Property Act," July 29, 1954, (68 Stat. 580, App. B9) upon recommendation of the Department of the Interior and without objection from the Bureau of the Budget. This statute gave express authorization to the Secretary of the Interior to transfer title to project movable property to a water users' organization when it took over the care, management and operation of a reclamation project. Its purpose was to clarify the Secretary's authority. In addition, it authorized the Secretary prior to turnover to buy essential movable property for the purpose of conveying it when the project was turned over. The requirement is made that this property be purchased with funds advanced by the Water Users' organization or that it be the subject of an appropriate payment contract. See U. S. Code Congressional and Administrative News, 1954, Vol. 2, 83rd Congress, pages 2691, 2692, for legislative history.

7. In 1965, upon recommendation of the Department of the Interior, this same clarifying legislation was enacted (79 Stat. 172) extending the same express authority to the Secretary when a municipality became the operator of reclamation works to obtain a water supply.

The Report of the House Committee, Interior and Insular Affairs, No. 435, in recommending passage of the statute noted, in reference to the 1954 statute:

> "It (1954 statute) has also been beneficial to the organizations because, with title to the property, they have more flexibility in their operations and can take such actions as repair or replacement of the equipment at their discretion, *with their own funds."* (Emphasis added.) U.S. Code Congressional and Administrative News, Vol. 1, p. 1794 et seq. 89th Congress First Session.

The fact that this legislation relates only to the *current* turnover of reclamation projects demonstrates clearly that the problem does not, in the view of the Secretary and the Congress, exist as to old projects, since the movable property plainly is considered as owned by such projects since acquired by use of their own funds or repayment has been or will be made therefor to the Government. Hence transfer of title from the United States is not required.

ADMINISTRATIVE AND JUDICIAL CONSTRUCTION OF THE RECLAMATION ACT

A. The contract under which the Secretary of the Interior turned the care, operation and maintenance of the project property over to the Water Users in 1917 *pursuant to his interpretation of the Reclamation Act and his authority thereunder, provided,* inter alia: (App. C1-10).

1. The Water Users were to maintain the facilities turned over at its own cost and expense and without cost to the United States in the condition "the same is now."

2. The Water Users might construct additional works at its own cost without procuring the assent of the Secretary.

3. That from date of takeover "all rents, issues, profits, revenue and income, including all income from power and power privileges, growing out of or arising from the operation and maintenance of the project and every part thereof" should be received by the Water Users "for its own use and benefit."

Plainly the Secretary of the Interior, in 1917, read the Reclamation Act as authorizing the Secretary to cut adrift a reclamation project once it was organized and substantially constructed to thereafter fend for itself as an independent business entity subject to the obligation to repay construction charges to the United States and to operate the project in accordance with the purpose of the Act for which purpose the Secretary reserved certain visitorial and rule-making authority.

B. The Minidoka Reclamation Project is located in Idaho and

consists of two divisions, each a quasi-municipal corporation organized under Idaho law. The Minidoka dam across the Snake River was built in 1904. The Secretary turned the operation of one division over to the organized Water Users in 1917 and of the other division in 1926. Secretary Work, March 14, 1927, rendered a decision under the Act of December 5, 1924, 43 U.S.C.A., Sec. 501, dividing the power profits between the two divisions in which he said "as the matter now stands, to state it simply, the Burley District owns 95.16 percent of the power plant, and the Minidoka District the remainder or 4.4 percent." *Wilbur v. Burley Irrigation District,* 58 F.2d 871 (C.A. D.C., 1932). (In *Burley Irrigation District v. Ickes,* 116 F.2d 529 (C.A. D.C. 1940) the Court of Appeals limited this language to a vested right to receive and own a percentage of the profits rather than the plant itself but it did not limit the outright ownership of the state corporation to the profits as received).

C. In 1932 Congress enacted the Moratorium on Construction Charges for 1931 and 1932 (47 Stat. 75) by which relief was afforded water users from payment of certain construction charges. By Section 8 of this statute it was required that credits to the account of projects from power revenues must be offset against current charges before the deferment could be made effective. Power profits from works not constructed at the expense of the United States were excepted from this setoff provision. The Solicitor General, in response to a request from the Commissioner of the Bureau of Reclamation wrote an opinion under date of August 29, 1932, as to the application of this statute to Water Users' power revenues which makes it clear that power sales from plants erected by the Water Users after 1917 in the opinion of the Solicitor belong to the Water Users and not to the United States. *Federal Reclamation Laws Annotated,* U. S. Department of Interior, Bureau of Reclamation, Vol. 1, p. 418, Notes to Section 8.

D. In 1958 the United States required certain property in downtown Phoenix for the construction of a new federal office

building and Court House which was then owned by the District.

The United States and the District then plainly understood that the United States did not in fact own the property and did not regard the ownership of Respondent as that of a mere trustee, for by Public Law 437 in the 85th Congress 2nd Session (72 Stat. 154) the Congress provided for the purchase of this property from the District " * * * now owned by it * * * at its appraised value, by warranty deed * * * with documentary stamps thereto attached in amounts required by law."

E. In *Swigert v. Baker*, 229 U.S. 187 (1913), this Court in a brief review of the Reclamation Act recognized that the purpose of the Act was to establish a revolving fund to reclaim land for agriculture, provide for the repayment of the cost of the project facilities by the water users, turn the project over to the farmers as a "going concern" and proceed to the construction of another project using repayment funds for this purpose.

In both *Wilbur v. Burley Irrigation District*, 58 F.2d 871, (C.A.D.C. 1932) and *Burley Irrigation District v. Ickes*, 116 F.2d 529, (C.A.D.C. 1940) the Court of Appeals for the District of Columbia clearly construed the reclamation statutes as contemplating each water users' group, upon assuming the care, operation and maintenance of a reclamation project, as becoming the owner of most of its facilities and as an autonomous, self-governing local entity.

THE DECISION OF THE ARIZONA SUPREME COURT CONFLICTS WITH GUIDELINES OFT STATED BY THIS COURT

No extended review of the cases decided by this Court is warranted. These principles have been clearly established.

1. The government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.

2. Immunity from suit in the case of a governmental agency

is not presumed. Only Congress can confer this attribute of sovereignity and it must be clear that it has done so.

3. Extension of the doctrine of governmental immunity is not favored. Waivers of governmental immunity should be liberally construed.

4. When it is contended by a governmental agent or agency as a defense that property which does not admittedly belong to the sovereign is in fact owned by the sovereign and hence is immune from process this fact becomes a matter of proof as any other fact.

Sloan Shipyards Corp. v. United States Shipping Board, 258 U.S. 549 (1921)
Federal Land Bank v. Priddy, 295 U.S. 229 (1935)
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 1939)
Federal Housing Admr. v. Burr, 309 U.S. 242 (1940)
Reconstruction Finance Corp. v. Menihan Corp., 312 U.S. 81 (1941)
Land v. Dollar, 330 U.S. 731 (1947)
Malone v. Bowdoin, 369 U.S. 643 (1962)
Dugan v. Rank, 372 U.S. 609 (1963)

The decision below gives recognition to none of these guidelines.

While it may be argued the Arizona Court's decision is directed only to condemnation by one municipal corporation of certain property of another which administers a reclamation project, its sweep is by no means so narrow. The holding fairly construed, says that this Agricultural Improvement District is so fully and completely a federal agency that it is above state law and its property may not be interfered with by legal process.

Since the Federal Tort Claims Act is clearly inapplicable the question inevitably arises if the decision below stands as to just what remedy an injured plaintiff may have if badly injured by a District truck or by a carelessly dropped electric transmission line.

The question also arises in view of the broad and all-inclusive sweep of the Arizona Court's opinion if it is unreversed:

What restraints are available to the citizen and the rate payer through recourse to state courts or regulatory agencies to insure that this vast public utility business will be operated in the public interest?

PUBLIC IMPORTANCE OF THE QUESTIONS PRESENTED

The report of the Administrator, Rural Electrification Administration 1965, demonstrates that federal funds today furnish the financial lifeblood for an almost unlimited and perhaps almost unascertainable number of local and state entities. This report, Table 1, p. 26 shows the total number of electric borrowers in 1965 to be 1,104, with loans made in 1965 totaling $379,993,000 and with a cumulative total of loans of $5,631,752,196.

The Supreme Court of the State of Washington has determined by a 3-2 decision that property of an REA financed cooperative cannot be condemned because of the sovereign immunity of the United States from suit. *Public Utility District No. 1 etc. v. Inland Power & Light Co.*, 64 Wash.2d 122, 390 P.2d 690 (1964). The Supreme Court of Alaska in *City of Fairbanks v. Electric Distribution System*, ... Alaska ...., 413 P.2d 165 (1966), has reached the same conclusion but for somewhat different reasons. The United States District Court for the Western District of Louisiana in *Central Louisiana Electric Company, Inc. v. Rural Electrification Administration*, 236 Fed.Supp. 271 (1964) in a somewhat different legal and fact situation has rejected the plea of sovereign immunity as barring the suit.

Petitioner respectfully urges that this is an appropriate occasion in the public interest for this Court to furnish guidance to the lower courts, both federal and state, as to the appropriate guidelines in this related but in some respects new area of controversy involving federal law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respecfully submitted,

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November 21, 1966

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APPENDIX A

City of Mesa v. Salt River Project Agr. Imp. & P. Dist., ... Ariz. ...., 416 P.2d 187 (1966).

CITY OF MESA, a municipal corporation, Appellant,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an agricultural improvement district, Appellee.

No. 8200.

Supreme Court of Arizona.
In Banc.

July 1, 1966.

J. LaMar Shelley, Mesa, for appellant.

Jennings, Strouss, Salmon & Trask, Irving A. Jennings, Phoenix, for appellee.

Ramsey Clark, Asst. Atty. Gen., Charles A. Muecke, U. S. Atty., Arthur E. Ross, Asst. U. S. Atty., Phoenix, Roger P. Marquis, Atty., Dept. of Justice, Washington D.C., amici curiae United States of America.

McFARLAND, Justice.

The City of Mesa, a municipal corporation, the appellant—hereinafter designated the plaintiff—brought an action in eminent domain to condemn a portion of the electrical plant and system of the Salt River Project Agricultural Improvement and Power District, an agricultural improvement district—hereinafter designated the defendant—located at the Bayless Shopping Center on East Main Street in Mesa, Arizona.

Defendant filed a motion to dismiss the action on the ground that the United States of America is an indispensable party to the action, and therefore the court lacks jurisdiction. The United States of America filed an amicus curiae brief claiming the United States government was an indispensable party to the suit in that

the property sought to be condemned is an integral part of an important vital federal reclamation project.

The lower court entered the following judgment October 15, 1963:

> "It is the opinion of this Court that the U.S. of America is an indispensable party in this action, and that therefore this Court lacks jurisdiction over the action.
>
> "IT IS HEREBY ORDERED that the Complaint herein be dismissed and that each party shall bear their own costs."

From this judgment plaintiff appealed.

In City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 373 P.2d 722, plaintiff brought an action against defendant for a declaratory judgment to determine the respective rights of the parties to serve electrical energy in certain areas within its corporate limits, including the Bayless Shopping Center. It is the contention of plaintiff that in this decision this court gave plaintiff the right to condemn the property involved in this action.

This court has had occasion to set forth the history of the Salt River Valley Project and the Salt River Valley Project Agricultural and Improvement and Power District in other cases[1], the latest being Uhlmann v. Wren, 97 Ariz. 366, 401 P.2d 113. A large portion of the Salt River Valley was irrigated and cultivated in prehistoric times, but had been largely abandoned when white settlers began to arrive about 1867. Adjacent to what is now the Salt River Project were found the Mohave, Apache, Pima, and Maricopa Indians. While their reservations covered many thousands of acres, the irrigated lands consisted of only 4,713 acres, which lay along and close to the Salt and Verde Rivers.

When the white settlers came, they found it desirable and

---

[1]City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 373 P.2d 722; Reichenberger v. Salt River Project Agricultural Improvement and Power District, 50 Ariz. 144, 70 P.2d 452; The Salt River Valley Water Users' Association v. Spicer, 28 Ariz. 296, 236 P. 728; Orme v. Salt River Valley Water Users' Association, 25 Ariz. 324, 217 P. 935.

necessary to form canal companies. They soon found, however, that the flow of the river varied, and that during the years of drought the supply of water at low river stages was inadequate for the land they had placed in cultivation. Maintenance of the brush and rock diversion dams became a problem, for such dams were often washed out at the beginning of the flood. It was soon determined that a permanent dam, or dams, and a canal system were needed. Private capital was not available, so, in order to accomplish their objectives, when the Reclamation Act of June 17, 1902, 32 Statute 388, known as the Reclamation Act, now codified as 43 U.S.C.A. §371 et seq., became effective, application was made for a federal reclamation project under the Act.[2]

The Salt River Valley Water Users Association was incorporated under the laws of Arizona February 9, 1903, and a written agreement for the construction of the Project was entered into on June 25, 1904, between the Association and the United States of America. Title to Project property, under the authority of the Reclamation Act was retained in the United States government. The agreement was signed by the Secretary of the Interior on behalf of the United States, and by the Association president and secretary on behalf of the Association. This agreement resulted in the construction of what is now known as the Theodore Roosevelt Dam, and the Project soon expanded to include the construction of the canal system and the power facilities. By 1907 the United States had purchased the various canals and acquired the distribution system in the Valley. In 1910 a contract was entered into between the Association and the United States for the construction of certain additional canals and electric power plants, the immediate cost to be borne by the Association.

During the entire period prior to 1917 the Project was under the operation and control of the United States Reclamation Service. Although the Roosevelt Dam had not been actually

[2]The Salt River Project was the first project organized under the Reclamation Act of 1902.

completed until 1911, the first distribution of water stored behind the same was made in 1910.

On September 6, 1917, the Association made a supplemental contract with the United States (by the Secretary of the Interior), in which the United States turned over to the Association the care, operation, and maintenance of the Salt River Project. This included power plants, power houses, and transmission lines as well as all of the irrigation facilities.

In 1937 the Association, by agreement, transferred—subject to the rights of the United States of America—to the District all of its properties, including all water and power rights, franchises and privileges. The agreement recited the various contracts and obligations thereunder between the Association and the United States government in regard to the construction, operation, and maintenance of the Salt River Project, in which the District assumed the obligations thereunder. This contract was approved by the Secretary of the Interior, subject to all of the provisions of the contracts between the United States and the Association in existence as of the date of its approval, and the Salt River Project Agricultural Improvement and Power District expressly stated approval was made without waiver, modification, or abridgment of any of the terms or provisions of the contracts in existence at the time. Approval further provided that any remedy available to the United States against the Association by virtue of any contracts mentioned would be enforceable against the District.[3]

Both defendant and the United States, in their briefs, contend that the United States government is the owner of the project facilities sought to be condemned, and the United States of America is an indispensable party to this action.

[1] In the case of Carr v. United States, 98 U.S. 433, 25 L.Ed. 209, the court held:

"* * * We consider it to be a fundamental principle that the

[3] 1937 contract between the Salt River Valley Water Users Association and the Salt River Project Agricultural Improvement and Power District.

Government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the Government suable in its courts. * * *" 98 U.S. at 437, 25 L.Ed. at 211.

It has been held to be elemental that the United States government is an indispensable party in an action against property in which the United States has an interest.

This principle of law was well set forth in the case of Public Utility District No. 1 of Pend Oreille County v. Inland Power & Light Company, 64 Wash.2d 122, 390 P.2d 690, and supporting authorities. We do not deem it necessary to add to the decisions cited therein. The property sought to be condemned was all of the electrical works, lines, plants, facilities, and electrical properties owned and operated by the Inland Power & Light Company, which, being a non-profit membership corporation organized under the laws of the State of Washington, was financed in its operation by the Rural Electrification Administration, an agency of the United States Department of Agriculture. The questions presented in Inland Power & Light Company, supra, are the same as in the instant case—that is, did the court lack jurisdiction for the reason that the United States government was an indispensable party to the action? The court held:

"It is elemental that an action against property in which the United States has an interest is a suit against the United States. In United States v. Brosnan, 363 U.S. 237, 250, 80 S.Ct. 1108, 4 L.Ed.2d 1192 (1960), the court said:

"'* * * Under the decisions of this Court, a judicial proceeding against property in which the Government has an interest is a suit against the United States which cannot be maintained without its consent. The Siren, 7 Wall. 152, 19 L.Ed. 129; State of Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; United States v. State of Alabama, 313 U.S. 274, 61 S.Ct. 1011, 85 L.Ed. 1327. It has been suggested that this principle applies only where the Government holds a fee interest or such other interest in the property as to render it an indispensable party under state law. See United States v. Cless, 3 Cir., 254 F.2d 590, 592. That however, seems a dubious distinction since whether or not the United

States is an indispensable party to a judicial proceeding cannot depend on state law. See. State of Minnesota v. United States, supra, 305 U.S. at page 386, 59 S.Ct. at page 294, 83 L.Ed. 235.'

"It is urged that the United States (being fully aware of what is happening, it having appeared as amicus curiae in this court) may make an appearance in the condemnation proceeding at any stage it wishes.

"The rule of law is to the contrary.

"'* * * Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States. Compare Case v. Terrell, 11 Wall. 199, 202, 20 L.Ed. 134; Carr v. United States, 98 U.S. 433, 435-439, 25 L.Ed. 209; Finn v. United States, 123 U.S. 227, 232-233, 8 S.Ct. 82, 85, 31 L.Ed. 128; Stanley v. Schwalby, 162 U.S. 255, 270, 16 S.Ct. 754, 760, 40 L.Ed. 960; United States v. Garbutt Oil Co., 302 U.S. 528, 533-535, 58 S.Ct. 320, 323, 82 L.Ed. 405,' Minnesota v. United States, 305 U.S. 382, 388, 59 S.Ct. 292, 83 L.Ed. 235.

"This is not a new or novel doctrine. In United States v. Clarke, 8 Pet. 436, 33 U.S. 276, 281, 8 L.Ed. 1001 (1834), Chief Justice Marshall said:

"'As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it. * * *'

"Authorities supporting the rule that the United States, as sovereign, is immune from suit save as it consents to be sued are collected in United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941).

"Counsel have not cited, nor have we been able to find a federal statute authorizing REA, or anyone on its behalf, to consent to suit against property in which it has an interest." 390 P.2d at 692.

[2-5] It is plain that, as held in the Inland case, supra, mere submission of the appearance by the United States as an amicus curiae does not give the court jurisdiction. Nor is it contended that Congress has passed authorization for the United States

to become a party to the action. In the instant case the question then is solely the interest of the United States government in the property sought to be condemned. Though this is an appeal from a summary judgment, all of the contracts were made a part of the record, and the determination of the issue turns upon the construction of these contracts and the provisions of the Reclamation Act and amendments thereto under which the Salt River Project was formed.

Section 10 of the contract dated June 25, 1904, between the United States and the Association, provides that:

> "* * * the rights of the members of the Association are to be defined and determined and enjoyed by and under the provisions of said Act of Congress and of other Acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and by the laws of Arizona where not inconsistent therewith, where such rights have vested, modified, if modified at all, by the Articles of Incorporation of said Association."

Prior to the contract dated September 6, 1917, all of the construction, operation and administration of the Project were conducted by the officers and employees of the United States government, under direction of the Secretary of the Interior. Under this contract the Association was designated by the United States as agent for the care, operation, and maintenance of Project facilities.

There were some 242,000 acres of land included in the Salt River Project. Soon after the Association took over the operation of the Project it became apparent there was not sufficient water for the irrigation of all of it, and it would be necessary to pump to prevent the waterlogging of the land, and for irrigation purposes. As a matter of fact, in the case of Hurley v. Abbott et al. (in the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County, March 1, 1910), which decided the respective water rights of the members of the Association, Judge Edward Kent recognized the existence of a number of pumping plants for the supply of water during

times of scarcity. Adams v. Salt River Valley Water Users' Association, 53 Ariz. 374, 89 P.2d 1060.

The pumping of this water required that the Association expand its electrical facilities. This court, in the case of Reichenberger v. Salt River Project Agricultural Improvement and Power District, 50 Ariz. 144, 70 P.2d 542, recognized the title in these facilities to be in the United States government, using the following language:

> "It soon appeared that the complete developments of the waters of the Salt and Verde, together with the electric power which might be generated thereby, required additional works of an extensive character. The government declined to advance any further money for this purpose, but did permit the association to issue bonds and to cause these works to be constructed on its own account, the legal title thereto being held by the government, and an additional indebtedness of many million dollars was incurred by the association in this manner. * *" 50 Ariz. at 147, 70 P.2d at 453.

In all of the contracts with the United States government, the government retained title to the property. The contract dated September 6, 1917, under which the Salt River Valley Water Users' Association took over the operation of the Project, did not vest title in the Association, but merely provided that:

> "* * * the United States agrees to and will * * * turn over to and vest in the said Association, the care, operation and maintenance of the irrigations works known as the Salt River Project, situate in the counties of Gila, Pinal and Maricopa, consisting generally of the Roosevelt Dam, the Granite Reef Dam, irrigation canals, laterals and ditches, and other conduits, gates, pipes, power plants, power houses, buildings and other structures of every kind, transmission, telegraph and telephone lines, wires, pumps, machinery, tools and appliances and all property of whatsoever kind, real, personal or mixed, appurtennant to or used, or constructed or otherwise acquired to be used, in connection with the said Salt River Project, whereso-ever said property may be situated, and as well, all water rights and franchises, and rights to the storage, diversion and use of water for irrigation or other purposes, water power,

electric power and power privileges, with such right of possession of all thereof, as shall be necessary or convenient for the care, operation and maintenance of said project by said Association, as hereinafter provided. * * *"

The contract also stated:

"* * * That it will make no substantial change in any of said works, without first having obtained the consent thereto, to be expressed in writing, of the Secretary of the Interior. * * *

* * * * * *

"* * * The Association agrees that all contracts which it may seek to execute for the sale or lease of power or power privileges covering a period of more than one year shall be subject to the approval of the Secretary of the Interior."

In setting forth the payments under the contract, it was provided that such payments would be paid "all without interest." The contract further provided:

"Fifteenth: The Association will in every practicable way cooperate with the Secretary of the Interior in carrying out the provisions of Section 2 of the act of Congress of May 19, 1916 (39 Stat., 130), providing for water rights for 631 Salt River Indian allotments of 10 acres each, and will cause to be performed such work as may be deemed necessary by the Secretary of the Interior to carry into effect the provisions of said law. The expense of such work will be met by the United States."

Paragraph nine provided that the contract could be cancelled or terminated upon March 1st of any year by giving one year's written notice thereof to the Secretary of the Interior, and that the agreement might be terminated by the United States government by written notice from the Secretary of the Interior, in case the Association failed to carry out the provisions of the law relating thereto or if the Secretary of the Interior should reasonably believe that the payment to it for the construction costs was being impaired by the failure or neglect of the Association to care for or maintain the Project.

The 1937 contract between the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District specifically provided:

"WHEREAS, the Association, in furtherance of the objects for which it was incorporated, has expended or undertaken the payment of the following amounts for the construction by the United States or by the Association with the approval of the United States, upon the lands of the United States, without or within the boundaries of the Association, and for the equipment of storage dams, diversion dams, power plants, distribution and communication lines, roads, bridges, power and irrigation canals, laterals, ditches, pumping plants, pipe lines, and other properties and facilities, all of which are owned by the United States, * * *:

* * * * * *

"7. The District agrees that it will hold title to all properties conveyed or assigned to it under the provisions of Paragraph 2 of this Agreement, for the use and benefit of the United States, insofar as the United States may have an interest therein under the Reclamation Act and its amendments, and subject to disposition of such interest by order of the Secretary of the Interior of the United States, or other officer designated thereto by the Act of Congress known as the Reclamation Act, or acts amendatory thereof."

This contract was approved by the Secretary of the Interior on the express condition:

"* * * that the District agrees to accept title to the property conveyed subject to any and all provisions of all contracts between the United States and the Association and that the District will faithfully and promptly comply with any order directed to the Association by the United States pursuant to said contracts, and that any remedy available to the United States against the Association by virtue of the contracts mentioned shall be enforceable against the District."

Plaintiff contends that the United States has no real interest in the subject matter of this condemnation. In its brief, it states:

"* * * The consideration for turning over of the works is that the Association shall pay to the United States the cost of construction and acquisition of the project promptly and without default, and sets up the times of payment. Without question, the entire original cost has now been repaid."

Plaintiff also states that since the construction cost has been paid,

the only excuse for termination of the contract by the United States is if the Association fails to carry out the provisions of the law or of the agreement, but since the United States has been paid in full, plaintiff asks the question ,"how can it longer claim any right to terminate?"

These are questions largely answered by the decision of the United States Supreme Court in the case of Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313, which specifically involved parts of two statutory enactments —one being Section 5 of the Reclamation Act of 1902 providing generally that no right to the use of water shall be sold for lands in excess of 160 acres to a single owner—and the other, Section 9 of the Reclamation Act of 1939 in regard to the repayment of the United States for funds expended on construction of reclamation works. The same question is raised in the instant case in regard to the interest of the United States in the Salt River Project after repayment. The U. S. Supreme Court, in the Ivanhoe case, supra, in speaking of the repayment provision, stated:

"The over-all allocation of these enormous costs has not been definitely determined. That portion of the costs ultimately allocated to power facilities will be reimbursed at 4% interest, but that allocated to irrigation facilities will be reimbursed at *no* interest. Moreover, the Federal Government will receive no reimbursement for that portion of the cost allocated to numerous aspects of the project, such as navigation, flood control, salinity prevention, fish and wild life preservation, and recreation. The irrigators will, therefore, be chargeable with but a small fraction of the total cost of the project." 357 U.S. at 283, 78 S.Ct. at 1179, 2 L.Ed.2d at 1321

* * * * * *

"VI. THE CONSTITUTIONAL ISSUES.

"Appellees urge, however, that the federal statutes requiring insertion of these provisions in the contracts are unconstitutional as a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments. They assert that the excess acreage provisions amount to a taking of vested property rights both in land and irrigation district water, and

discriminate between the nonexcess and the excess landowner. We cannot agree.

"There can be no doubt of the Federal Government's general authority to establish and execute the Central Valley and Santa Barbara County projects. As we said in United States v. Gerlach Live Stock Co. [339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231, 20 A.L.R.2d 633,] supra, the Congress 'elected to treat it [the Central Valley Project] as a reclamation project.' 339 U.S. at 739, 70 S.Ct. [955] at page 962. We upheld its power to pursue the project as 'clear' and 'ample,' an exercise of the general power 'to promote the general welfare through large-scale projects for reclamation, irrigation or other internal improvement.' Id. 339 U.S. at page 738, 70 S.Ct. [955] at page 962. The Santa Barbara Project is supportable on the same grounds. Cf. United States v. Butler, 1936, 297 U.S. 1, 65-67, 56 S.Ct. 312, 80 L.Ed. 477, 488, 489 [102 A.L.R. 914]. In *developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, §8, of the Constitution, but also from Art. IV, §3, relating to the management and disposal of federal property. As this Court said in United States v. City and County of San Francisco, 1940, 310 U.S. 16, 29-30, 60 S.Ct. 749, 756, 84 L.Ed. 1050 {1059}, 1060 this power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."'"* [Emphasis supplied] "See also United States v. State of California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889, 1893 (1947), and State of Alabama v. State of Texas, 347 U.S. 272-274, 74 S.Ct. 481, 98 L.Ed. 689, 693, 694 (1954).

"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See Berman v. Parker, 1954, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, and Federal Power Comm. v. Idaho Power Co., 1952, 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed. 15. The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those

prescribed or authorized by Congress. Public Utilities Comm. of State of California v. United States, 1958, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470. Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.

"In considering appellees' specific constitutional contentions, it is well to recapitulate. The Central Valley Project is multi-purpose in nature. That portion of the project expense attributable to navigation, flood control, salinity prevention, recreation and fish and wildlife preservation is nonreimbursable. The remainder of the total expense, and the only part that is reimbursable, is divided between two main sources. The first is hydroelectric power which estimates indicate will be chargeable with over 50 percent of the reimbursable expenses, plus interest on the part representing electric plants in service. *The other is irrigation, which pays the rest without interest charge. In short, the project is a subsidy, the cost of which will never be recovered in full.*" [Emphasis supplied] "Appellees argue that the same reasoning applies to power facilities, but there the Government is operating the generating facilities itself and the base rate upon which the power is sold includes an item for interest on the amount of expenditures allocated to that purpose. Hence the true relationship of debtor-creditor is maintained. In the light of these facts we believe that the language of the Court in Wickard v. Filburn, 1942, 317 U.S. 111, 131, 63 S.Ct. 82, 92, 87 L.Ed. 122, [138] is apposite: 'It is hardly lack of due process for the Government to regulate that which it subsidizes.'

* * * * * *

"Second, objection was made to the absence of any provision to the effect that the districts would obtain title to the distribution systems when their obligations therefor had been totally discharged. We do not understand appellees to contend that the districts and landowners should ultimately obtain title to the principal dams and reservoirs. The fact that irrigation interests are bearing but a small fraction of the cost of the water supply facilities renders such a suggestion untenable. For related reasons we see no defect in the failure to guarantee passage of title to the local distributing systems at the end of 40 years when it is contemplated that the obligation therefor shall have been discharged. As we have pointed out, even the

terms regarding the distribution systems involve a substantial federal subsidy because no interest is charged over the 40-year period during which the principal amount is repaid. In reality, the districts will *never* repay the total cost of the systems." 357 U.S. at 294, 78 S.Ct. at 1185, 2 L.Ed. at 1327

As pointed out in Ivanhoe, supra, the irrigation features of federal irrigation projects are built without the payment of interest. This is true in the instant case; thus, in reality, the cost has never been and will never be fully repaid. The United States is interested in seeing that the District fulfills its obligation as set forth in paragraph 15 of the 1917 contract in regard to providing for water for the Salt River Indian allotments, in the enforcement of the 160-acre limitation per person, and the fulfillment of other provisions of the contracts.

As stated in these cases, the Reclamation Act was passed for the benefit of the people to develop the arid lands of the West. The people trying to develop this great Salt River Valley of Arizona—just as in the Central Valley in California—found it necessary to call upon the United States government for help, and, as the United States Supreme Court said in the Ivanhoe case, supra, the power of the Federal Government to impose reasonable conditions upon the use of federal funds, federal property, and federal privileges is beyond challenge.

The initial money for the construction of this project was put up by the Federal Government. Without this initial investment the expansion would not have been possible. The initial investment gave the Project the financial standing necessary to secure loans. For example, payment of bonds issued for construction of dams below Theodore Roosevelt Dam was made possible by the sale of electricity generated at such dams, because Theodore Roosevelt Dam stored water which could be let down for the generation of electricity. The sale of this additional electricity, however, depended on an expansion of the market. It is an integrated project, the success of one phase depending on the others. It was evidently for this reason that in the 1917 contract

the Association was required to agree to the provision: "That it will make no substantial change in any of said works, without first having obtained the consent thereto, to be expressed in writing, of the Secretary of the Interior * * *" Plaintiff points to the further provision in the same paragraph which permits the District to construct additional works at its own cost without the necessity of procuring the assent of the Secretary of the Interior, provided that such additional works shall not in any wise impair or diminish the present efficiency or adequacy of the project for the purposes for which it has been designed, constructed and acquired, as supporting its contentions that the United States government did not thereby gain an interest in the property sought to be condemned in the instant case. This is not the interpretation as represented to Congress first in 1922 by Carl Hayden in securing the passage of the bill to permit the sale of surplus power on the Salt River Reclamation Project. Senator Hayden, then Congressman, in a report from the Committee on Irrigation of Arid Lands[4], stated:

> "Under our contract with the Government any new development or extension of our present power system automatically becomes the property of the United States Government; to be operated for the benefit of the project it is true, but nevertheless the title will always remain in the United States Government. Furthermore, the Government now has a prior lien on this project of over $9,000,000. This makes the financing of this new development a difficult proposition by any of the usual methods. Direct assessment on the farmers of this valley for this development would be useless to consider at this time."

The same representation was made to the Senate in the report of the Committee on Irrigation and Reclamation by Senator Cameron.[5] This has also been the interpretation of this court in the case of Reichenberger v. Salt River Agricultural Improvement and Power District, supra. This same interpretation was

[4]Report No. 1000, 67th Congress, 2d Session, House of Representatives.

[5]Senate Report No. 826, 67th Congress, 2d Session.

recognized in the recent case of Uhlmann v. Wren, supra, in which it was pointed out that our Legislature had also recognized the interest of the Federal Government in this project.

"Section 5 of the Act (now codified as A.R.S. § 45-2163, subsec. D) provides that the District's powers in a contract with the Federal Government include the following:

"'That by any such contract or agreement, the district may agree that the Federal Government, or any such public or private agency, or corporation, may assume or may liquidate, compromise, pay or discharge, all or any part of the indebtedness of the district; may agree that the stock or other evidence of the ownership or interest of the district in any such private corporation or agency, as *well as any other properties of the district, may be placed or held in trust irrevocably* during the term of such contract or agreement or for such other period as may be prescribed in such contract; * * *.'

"Thus, this legislation shows that in 1934 the Legislature was aware that the Federal Government might have an interest in District property as a result of contract. Two years later, in 1936, the Legislature enacted § 8, Chapter 10, Laws of 1936, 1st S.S. (now codified as A.R.S. § 45-940, subsec. B), which provides in pertinent part as follows:

"'*The board * * * shall also have the right and power,* for and in the name of and for the use and benefit of the district, *to exercise the right of eminent domain* and thereby take, hold and possess any and all such land and other property as may be necessary for the construction, use, maintenance, repair, improvement or extensions of any works necessary or useful for the purposes of the district.'

"Having empowered the District in 1934 to make contracts with the Federal Government whereby the latter would have an interest in District property, the Legislature was aware in 1936 that property taken under the power of eminent domain which it was then authorizing would also be subject to a possible Federal interest. This sequence of legislation clearly demonstrates that the Legislature did not intend to render nugatory the power of eminent domain which it was granting because two years earlier it had authorized the District to place its properties in trust for the Federal Government." 97 Ariz. at 384, 401 P.2d at 125.

Plaintiff states that the representation of the United States that the facilities are located on a general perpetual right-of-way easement granted in the landowners' contract for inclusion of their lands in the Project is not factual, in that it contradicts the wording of the easement attached on the Representation of Interest which was executed the 27th day of May, 1958. This easement was one granted in the contract of the landowners for inclusion of their lands in the Project.

It is immaterial as to how the Project secured these easements, as was recognized in the case of City of Mesa v. Salt River Project Agricultural Improvement and Power District, supra, in which we stated:

> "* * * The legislature has granted to the District without restriction the right to sell power and the District has acted upon this grant by extending its distributing system so as to meet the reasonable needs of those inhabiting the disputed areas. Whether in so doing the District used the public roads of the state and county, private ways, easements asserted to arise out of the water right applications or a combination thereof is not material to the decision here. A large investment has been made in generating equipment and the various works necessary to supply power to consumers.
>
> * * * * * *
>
> "If the public roads of the state or any of its political subdivisions have been used by the District in the operation of its distribution system, consent to such must necessarily be implied from the fact thereof. The District may not be ousted from the use of the public ways once having accepted by acting on the grant of the state. City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859; cf. Traverse City v. Consumers Power Co., 340 Mich. 85, 64 N.W.2d 894; Southern Bell Telephone & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So.2d 666." 92 Ariz. at 99, 373 P.2d at 728.

Under the interpretation which has been placed upon the contracts with the United States government by this court, property acquired by the District in the extension of the Project's electrical plant and distribution system is held in trust for the United States. The basis of the amendment to the Reclamation Act to

permit the sale of power by the Project was, as stated by Carl Hayden, then Congressman, "* * * any new development or extension of our present power system automatically becomes the property of the United States Government; * * *." Senator Hayden pointed out at the time (1922) that this amendment was passed to permit the Project to finance this additional development.

The Reichenberger case, supra, in speaking of additional electrical works of an extension character which were to be paid for by bonds of the Project, also stated "* * * the legal title thereto being held by the government, * * *" At no place in the contracts, or in the interpretation of the contracts is it recognized or provided that any part of the Project's electrical plant or distribution system would be held other than in trust for the Federal Government.

This case only involves the jurisdiction of the state courts when the United States government has an interest in property sought to be condemned. We have recognized the right of the Project to bring suit and they have brought suit in many other instances.

We do not pass upon what the United States government should do in regard to the title to these various projects, for as stated in the Ivanhoe case, supra, this is a matter to be determined by the Federal Government and not by this court. Plaintiff is not without remedy, but its remedy does not lie in this court. We find the United States of America has an interest in the property sought to be condemned, and is an indispensable party to the action. We therefore hold the lower court did not have jurisdiction over the action.

Judgment affirmed.

STRUCKMEYER, C. J., BERNSTEIN, V. C. J., and UDALL, J., concur.

NOTE: Justice LORNA E. LOCKWOOD did not participate in the determination of this appeal.

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APPENDIX B

ARIZONA CONSTITUTION, Article XIII, Sec. 5

§ 5. Right of municipal corporation to engage in business or enterprise

Section 5. Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.

SECTIONS 9-101, 9-231, 9-511, 9-514, 9-515 A, B, 9-516, 9-522 A, 9-523, 9-537 A.R.S.

§ 9-101. Incorporation

A. When two thirds of the real property taxpayers residing in a community containing a population of five hundred or more inhabitants petition the board of supervisors, setting forth the metes and bounds of the community, and the name under which the petitioners desire to be incorporated, and praying for the incorporation of the community into a city or town, and the board is satisfied that two thirds of the real property taxpayers residing in the community have signed the petition, it shall, by an order entered of record, declare the community incorporated as a city or town.

B. When ten per cent of the real property taxpayers residing in a community containing a population of five hundred or more petition the board of supervisors in the manner prescribed in subsection A, praying for the calling of an election for the purpose provided in this section, the board shall within sixty days after filing the petition call the election, and the election shall take place on the fourth Tuesday after the next following state general election. Only real property taxpayers who shall also in all respects be qualified electors of the state and community, shall vote on this question. If a majority of real property taxpayers voting thereon vote for incorporation, then the board of super-

visors shall, by an order entered of record, declare the community incorporated as a city or town.

C. By whichever proceeding the incorporation of a city or town is accomplished, the order shall designate the name of the city or town, and its metes and bounds, and thereafter the inhabitants within the area so defined shall be a body politic and corporate by the name designated.

D. For the purposes of this section, the word community shall mean a locality in which a body of people reside in more or less proximity having common interests in such services as public health, public protection, fire protection, and water which bind together the people of the area, and where the people are acquainted and mingle in business, social, educational and recreational activities.

E. An area to be incorporated shall not include large areas of uninhabited, rural or farm lands, but it shall be urban in nature. As amended Laws 1956, Ch. 18, §1.

Effective July 14, 1956.

§ 9-231. Common council

A. The corporate powers of a town incorporated under the provisions of §9-101 shall be vested in a common council. The first common council shall be appointed by the board of supervisors, upon declaring the town incorporated, and they shall continue in office until their successors are elected and qualified. The successors shall be elected by the qualified electors residing in the town at an election held for that purpose on the fourth Monday in May following, and on the fourth Monday in May each two years thereafter.

B. The common council of every town shall consist of five members, or if the population exceeds fifteen hundred, of seven members.

§ 9-511. Power to engage in business of public nature; right of eminent domain

A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business or enterprise. A municipal corporation may also purchase, acquire and own real property for sites and rights of way for public utility and public park purposes, and for the location thereon of water works, electric and gas plants, municipal quarantine stations, garbage reduction plants, electric lines for the transmission of electricity, pipe lines for the transportation of oil, gas, water and sewage, and for plants for the manufacture of any material for public improvement purposes or public buildings.

B. The municipality may exercise the right of eminent domain either within or without its corporate limits for the purposes as stated in subsection A of this section, and may establish, lay and and operate a plant, electric line or pipe line upon any land or right of way taken thereunder, and may manufacture material for public improvement purposes and barter or exchange it for other material to be used in public improvements in the municipal corporation, or sell it to other municipal corporations for like purposes, and for any and all such purposes.

§ 9-514. Authority to engage in utility business

Before construction, purchase, acquisition or lease by a municipal corporation, as authorized in §§ 9-511 to 9-513, inclusive, of any plant or property or portion thereof devoted to the business of or services rendered by a public utility shall be undertaken, the construction, purchase, acquisition or lease shall be authorized by the affirmative vote of a majority of the qualified electors who are taxpayers of the municipal corporation voting at a general or special municipal election duly called and held for the purpose of voting upon the question.

§ 9-515. Purchase of existing utility plant and property; valuation; appeal

A. When a municipal corporation and the residents thereof are being served under an existing franchise by a public utility, the municipal corporation, before constructing, purchasing, acquiring or leasing, in whole or in part, a plant or property engaged in the business of supplying services rendered by such public utility, shall first purchase and take over the property and plant of the public utility.

B. The property and plant shall become the property of the municipal corporation upon payment by the municipal corporation of the fair valuation thereof within eighteen months after the determination of the valuation in the manner hereinafter provided.

§ 9-516. Declaration of public policy; eminent domain

A. It is declared as the public policy of the state that when adequate public utility service under authority of law is being rendered in an area, within or without the boundaries of a city or town, a competing service and installation shall not be authorized, instituted, made or carried on by a city or town unless or until that portion of the plant, system and business of the utility used and useful in rendering such service in the area in which the city or town seeks to serve, has been acquired.

B. The city or town which seeks to acquire the facilities of a public service corporation shall have the right to do so under eminent domain. Such action shall be brought and prosecuted in the same manner as other civil actions.

§ 9-522. Power to issue bonds

A. In addition to its other powers, a municipality may:

1. Subject to the requirements and restrictions of §§ 9-515 through 9-518, within or without its corporate limits, construct, improve, reconstruct, extend, operate, maintain and acquire, by gift, purchase or the exercise of the right of eminent domain, a utility undertaking or part thereof, and acquire in like manner land, rights in land or water rights in connection therewith.

2. Issue its bonds to finance the cost thereof.

3. Pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as they become due, and create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue.

§ 9-523. Bond election

Questions on bond issues under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

§ 9-537. Supplemental nature of article

In so far as the provisions of this article are inconsistent with any other provision of law, the provisions hereof shall be controlling. The powers conferred by this article shall be in addition and supplemental to the powers conferred by any other law. Except as expressly provided in this article, the utility undertaking may be constructed, improved, reconstructed, extended and acquired, notwithstanding any other law providing for the construction, improvement, reconstruction, extension or acquisition of a like utility undertaking and without regard to the requirements, restrictions or other provisions contained in any law, including, but not limited to, §§ 9-511 to 9-514, inclusive. Bonds may be issued under this article for any utility undertaking, notwithstanding that any other law may provide for the issuance of bonds for a like purpose and without regard to the requirements, restrictions or provisions contained in any other law.

RECLAMATION ACT OF 1902, Sections 4, 6, (32 Stat. 388)

SEC. 4. [Contracts for construction—Public notice of irrigable lands, limit of area, charges per acre, and method of payment —Limit of work hours—Mongolian labor.]—That upon the de-

termination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon. (32 Stat. 389.)

SEC. 6. [Reclamation fund to be used for operation and maintenance—Management of works to pass to landowners—Title.]—That the Secretary of the Interior is hereby authorized and directed, to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided,* That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the

Government until otherwise provided by Congress. (32 Stat. 389.)

RECLAMATION EXTENSION ACT OF AUGUST 13, 1914
Section 5 (38 Stat. 687)

SEC. 5. [Operation and maintenance charges—Basis therefor—Minimum charge—Secretary may transfer care and operation of project—Reduction or increase of charges.]—That in addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water: *Provided,* That whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe. If the total amount of operation and maintenance charges and penalties collected for any one irrigation season on any project shall exceed the cost of operation and maintenance of the project during that irrigation season, the balance shall be applied to a reduction of the charge on the project for the next irrigation season, and any deficit incurred may likewise be added to the charge for the next irrigation season. (38 Stat. 687.)

"FACT FINDERS ACT", Subsections G and I, Section 4, (43 Stat. 672)

SUBSEC. G. [Transfer of project to water users—Receipts credited as part of construction repayments.]—That whenever

two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a condition precedent to receiving the benefits of this section to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users' association or irrigation district, and when the water users assume control of a project the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments. (43 Stat. 702, 43 USC 500.)

SUBSEC. I. [Profits from projects taken over by water users.] —That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid. (43 Stat. 703, 43 USC. 501.)

IRRIGATION DISTRICTS—TITLE TO MOVABLE PROPERTY—TRANSFER

See Legislative History, p. 2691

CHAPTER 616—PUBLIC LAW 551
[H. R. 8026]

An Act to provide for transfer of title to movable property to Irrigation districts or water users' organizations under the Federal reclamation laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Whenever an irrigation district or water users' organization assumes operation and maintenance of irrigation works pursuant to a contract entered into with the United States in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), the Secretary of the Interior may transfer to said district or organization title to movable property which has been purchased with funds advanced by the district or organization or which, in the case of property purchased with appropriated funds, is necessary to the operation and maintenance of such works and the value of which is to be repaid under a contract with the district or organization.

Approved July 29, 1954.

MOVABLE PROPERTY—TITLE TRANSFER

For Legislative History of Act, see p. 1794

PUBLIC LAW 89-48; 79 STAT. 172
[S. 1000]

An Act to amend the Act of July 29, 1954, as amended, to permit transfer of title to movable property to agencies which assume operation and maintenance responsibility for project works serving municipal and industrial functions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 1 of the Act of July 29, 1954 (68 Stat. 580), as amended by the Act of August 2, 1956 (70 Stat. 940), is further amended to read as follows:

"Sec. 1. That whenever an irrigation district, municipality, or water users' organization assumes operation and maintenance of works constructed to furnish or distribute a water supply pursuant to a contract entered into with the United States in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) (43 U.S.C. 371 et seq.), the Secretary of the Interior may transfer to said district, municipality, or organization title to movable property which has been purchased with funds advanced by the district, municipality, or organization or which, in the case of property purchased with appropriated funds, is necessary to the operation and maintenance of such works and the value of which is to be repaid under a contract with the district, municipality, or organization. In order to encourage the assumption by irrigation districts, municipalities, and water users' organizations of the operation and maintenance of works constructed to furnish or distribute a water supply, the Secretary is authorized to use appropriated funds available for the project involved to acquire movable property for transfer under the terms and conditions hereinbefore provided, at the time operation and maintenance is assumed."

Sec. 2. Whenever a municipal corporation or other organization to which water for municipal, domestic, or industrial use is furnished or distributed under a contract entered into with the United States pursuant to the Federal reclamation laws so requests, the Secretary of the Interior is authorized to transfer to it or its nominee the care, operation, and maintenance of the works by which such water supply is made available or such part of those works as, in his judgment, is appropriate in the circumstances,

subject to such terms and conditions as he may prescribe.

Approved June 24, 1965.

MORATORIUM ON CONSTRUCTION CHARGES, Section 8 (47 Stat. 75)

SEC. 8. [Credits on account of power profits under subsections I and J, Fact Finders' Act, or other act.]—In the case of any irrigation district, water-users' organization, or individual, receiving credits on account of power profits or other revenues under the provisions of subsections I and/or J, section 4, act of December 5, 1924 (43 Stat. 703), or any other act of Congress, when any extension is granted as provided in section 1, 2, or 4 the amount of such credits shall be deducted from the amount of any payment so extended: *Provided*, That the provisions of this section shall not apply to power profits or other revenues derived from works not constructed at the expense of the United States. The credits, if any, in excess of the payment so extended shall be applied as now provided by law and contract. Acceptance of the provisions of this act shall operate as a waiver of any law and/or contract providing for application of credits different from that in this section prescribed.

PHOENIX PROPERTY ACQUISITION ACT (72 Stat. 154)

Credits for Transfer of Property in Phoenix, Ariz.

An act to provide for certain credits to the Salt River Valley Water Users Association and the Salt River Project Agricultural Improvement and Power District in consideration of the transfer to the Government of property in Phoenix, Ariz.

(Act May 29, 1958, 72 Stat. 154)

[Phoenix, Ariz. Credits for property transfer.]—That upon certification by the Administrator of the General Services Administration to the Secretary of the Interior that the Salt River

Project Agricultural Improvement and Power District has tendered to the United States marketable title to certain properties in the city of Phoenix, Arizona, as evidenced by an acceptable abstract of title, certificate of title or title guaranty policy now owned by it which are necessary for, or reasonably useful in connection with, a new Federal courthouse and office building, that the Attorney General of the United States has rendered a written opinion in favor of the validity of the title and that the Administrator, acting on behalf of the United States, has accepted a warranty deed, in form approved by the Attorney General and with documentary stamps thereto attached in amounts required by law, conveying the unencumbered fee simple title to the properties therein described to the United States of America, the Secretary shall credit toward repayment of such of the obligations assumed by the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District under the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) [43 U.S.C. 371 and note.] as he finds proper an amount equal to the value of the properties transferred, as determined by an appraisal satisfactory to the Administrator, the Secretary, and the Salt River Project Agricultural Improvement and Power District: *Provided,* That if said amount is in excess of said obligations, the difference may be paid in cash or other valuable considerations.

SECTION 45-937 C. A.R.S.

§ 45-937. Powers of board of directors relating to property

C. In all courts, actions and proceedings the board may sue, appear and defend in person or by attorney in the name of the district.

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APPENDIX C

CONTRACT

BETWEEN

United States of America

AND

Salt River Valley Water Users' Association

DATED SEPTEMBER 6, 1917

THIS MEMORANDUM OF AN AGREEMENT, made by and between the UNITED STATES OF AMERICA, acting in this behalf by the Secretary of the Interior under the provisions of the act of June 17, 1902 (32 Stat., 388), and of acts amendatory thereof and supplementary thereto, together constituting the reclamation law, of the first part, and the SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, duly organized and doing business under the laws of the Territory (now State) of Arizona, of the second part and hereinafter for the sake of brevity of expression designated as the "Association" WITNESSETH:

FIRST: This agreement is to be held and deemed supplementary to the agreement made by and between the same parties, the memorandum whereof is dated June 25th, 1904, and it is understood and agreed that that agreement shall not be held or deemed in any wise to be affected, modified, changed or abrogated, in whole or in part, by this agreement, except as it may be done by the express terms of this agreement, or by reason of irreconcilable inconsistencies between the terms of the said agreement of June 25th, 1904, and the terms of this present agreement, and then only in those particular provisions so expressly hereby affected, modified, changed or abrogated, or between which there is such irreconcilable inconsistency manifested, in which case and so far only, the provisions of this agreement shall prevail over and to that extent affect, modify, change or abrogate the provisions of said agreement of June 25th, 1904.

Second: In consideration of the doing of the things, and of the full and prompt performance by the Association of all of the covenants and agreements hereinafter contained, which it hereby agrees that it shall do, perform and observe, and subject to all the conditions, terms, limitations and obligations hereinafter imposed upon it by the provisions of this agreement, the United States agrees to and will as soon after the signature of this agreement as may be practicable, turn over to and vest in the said Association, the care, operation and maintenance of the irrigation works known as the Salt River Project, situate in the counties of Gila, Pinal and Maricopa, consisting generally of the Roosevelt Dam, the Granite Reef Dam, irrigation canals, laterals and ditches, and other conduits, gates, pipes, power plants, power houses, buildings and other structures of every kind, transmission, telegraph and telephone lines, wires, pumps, machinery, tools and appliances and all property of whatsoever kind, real, personal or mixed, appurtenant to or used, or constructed or otherwise acquired to be used, in connection with the said Salt River Project, wheresoever said property may be situated, and as well, all water rights and franchises, and rights to the storage, diversion and use of water for irrigation or other purposes, water power, electric power and power privileges, with such right of possession of all thereof, as shall be necessary or convenient for the care, operation and maintenance of said project by said Association, as hereinafter provided. And said Association shall from the time of the taking over of the care, operation and maintenance of said project thenceforward have and receive to its own use and benefit, all the rents, issues, profits, revenue and income, including all income from power and power privileges growing out of or arising from the operation and maintenance of the project and every part thereof by it.

Third: The Association agrees to accept the transfer to it of the care, operation and maintenance of said project, and that it will care for, operate and maintain the same and every essential part thereof in full compliance with law and the pro-

visions of this agreement, during all the time it shall have such charge of the same under the provisions of this agreement, in such manner that the same and every part thereof shall remain in as good and efficient condition, and of equal capacity for the storage, development, diversion and distribution of irrigation water, and for the service of electric energy as the same is now, as its own cost and without cost to the United States, provided that said Association shall not be required to maintain the capacity of the Roosevelt Reservoir so far as that may be diminished naturally by the deposit of silt therein by the Salt River, Tonto Creek and other tributaries thereto, and provided further that the Association shall not be required to make any replacements, renewals or repairs which may be made necessary by injury to or destruction of said works or an essential part thereof by public enemies of the United States or by the United States itself as a war measure.

That it will promptly pay all such cost of the care, operation and maintenance of the project as it is incurred. That it will make no substantial change in any of said works, without first having obtained the consent thereto, to be expressed in writing, of the Secretary of the Interior. It may, however, construct additional works at its own cost without the necessity of procuring the assent of the Secretary of the Interior of the United States, provided that such additional works shall not in any wise impair or diminish the present efficiency or adequacy of the project for the purposes for which it has been designed, constructed and acquired.

Fourth: The Association shall repay to the United States the cost of the construction, and acquisition otherwise, of said project promptly and without default.

Such cost shall be computed on the basis of a net balance due the Government on that account on the 1st day of January, 1917, of $10,279,190.98. To this there shall be added any sums expended by the United States, or the cost of which it shall have

incurred, on account of the construction, care, operation and maintenance of said project during the time elapsing between said 1st day of January, 1917, and the date upon which the Association shall take over the care, operation and maintenance thereof, under the provisions of this agreement. If the expenditures for operation and maintenance of the irrigation system shall be greater or less than the receipts from rentals up to the time when the project is turned over to the Association, the difference shall be paid to the United States by the Association in case of a deficit, or the difference shall be credited on the first installment in case of a surplus. Such adjustment to be made December 1, 1917.

The exact amount of the balance of such construction cost shall be computed to the date of the taking over by the Association of the care, operation and maintenance of said project, and then stated in writing by the Secretary of the Interior to the Association, and the amount so stated shall be deemed to be the net cost of said project which the Association agrees to pay to the United States.

Such payments shall be made in annual installments as follows:

Two	per	cent	thereof	on	or	before	December	1st,	1917
"	"	"	"	"	"	"	"	"	1918
"	"	"	"	"	"	"	"	"	1919
"	"	"	"	"	"	"	"	"	1920
Four	"	"	"	"	"	"	"	"	1921
"	"	"	"	"	"	"	"	"	1922
Six	"	"	"	"	"	"	"	"	1923
"	"	"	"	"	"	"	"	"	1924
"	"	"	"	"	"	"	"	"	1925
"	"	"	"	"	"	"	"	"	1926
"	"	"	"	"	"	"	"	"	1927
"	"	"	"	"	"	"	"	"	1928
"	"	"	"	"	"	"	"	"	1929
"	"	"	"	"	"	"	"	"	1930
"	"	"	"	"	"	"	"	"	1931
"	"	"	"	"	"	"	"	"	1932
"	"	"	"	"	"	"	"	"	1933
"	"	"	"	"	"	"	"	"	1934
"	"	"	"	"	"	"	"	"	1935
"	"	"	"	"	"	"	"	"	1936

All without interest.

The Association shall pay all penalties which may be prescribed by the reclamation law for individual delinquencies.

The United States will and does reserve the means given to it by reclamation laws to enforce payments of installments of construction costs, and will at its option, in case of individual default, adopt, practice, and enforce them, as occasion may require, notwithstanding the undertaking of the Association to pay them.

Fifth: The Association will use its powers and resources, cumulatively, if necessary, including the power to withhold the delivery of water, to enforce the rules and regulations made by the Secretary of the Interior under the provisions of law, or by the Association under its Articles of Association and by-laws, for

the proper care, operation and maintenance of the project and for carrying out the provisions of this agreement. If the enforcing of any such rules and regulations shall require the collection of any charges, penalties or interest from persons holding land the title of which has not passed out of the United States, the Association shall report such cases to the Secretary of the Interior who will aid the Association in enforcing such collections by the cancellation of entries and water right applications or by any other means authorized by law. But failure on the part of the Secretary of the Interior to enforce such collections in such cases shall not relieve the Association from the obligations assumed by it under this agreement.

Sixth: The Association shall use all practical methods to insure the economical and beneficial use of irrigation water. It shall also hold the United States harmless as to any damages which may accrue to other land or property either within or without the reservoir district growing out of the care, operation and maintenance of the project by the Association.

Seventh: The project and all its works and those connected with it may be inspected from time to time under the direction of the Secretary of the Interior when he shall deem it necessary to ascertain if the provisions of this agreement are being carried out and observed by the Association in the care, operation and maintenance of the project. The cost of such inspections shall be charged to the Association and become due to the United States on March 1st of each year for expenditures on that account during the preceeding year.

Eighth: The Association shall maintain all the works turned over to it under the provisions of this agreement in proper operating condition and make proper delivery of irrigating water to each farm entitled thereto, or at least as near to the farm as the United States is now delivering such water.

Ninth: This Agreement may be cancelled or terminated by

the Association on March 1st of any year upon not less than one year's written notice thereof to the Secretary of the Interior. It may be amended at any time, such amendment to be ratified by a vote of the members of the Association in the same manner as the original agreement, and all amendments must be approved by the Secretary of the Interior before becoming effective. This agreement may be terminated by the United States acting in that behalf by the Secretary of the Interior, at any time, by written notice from the Secretary of the Interior in case the Association fails to carry out the provisions of law relating thereto, or of this agreement, in their true intent and meaning, or if the Secretary of the Interior shall reasonably believe that the security of the United States for the payment to it of said construction cost, is being impaired by the failure or neglect of the Association to properly care for and maintain the project. Upon the termination of this agreement, the Secretary of the Interior shall have the right to exercise all the powers in regard to the project which are vested in him by law; he may also at any time, after the execution of this agreement, take such action as he may deem proper, either by his own officers or through the Association, for the collection of any charges with the penalties and interest due the United States, which may be unpaid.

Tenth: The Association will keep reasonably accurate records of water deliveries and of crops raised under the project and as well such other records as are appropriate to the interests of the project as a whole. The forms to be used shall be subject to the approval of the Secretary of the Interior.

Eleventh: The performance and discharge of all valid and subsisting obligations and contracts affecting the care, operation and maintenance of the project now in effect between the United States and other parties, shall be and are hereby assumed by the Association, and shall be faithfully discharged, performed and carried out by it as long as the Association shall have the care, operation and maintenance of the project under the provisions

of this agreement. The Association however, reserves and the United States accords to it the right to any legal objections or defense to the validity of any obligations which the United States itself might have if this agreement had not been made, it being understood that the general assumption by the Association of the obligations of the United States in relation to the care, operation and maintenance of the project shall not impart to such obligations any degree of validity which they did not possess before this agreement was made. The Association agrees that all contracts which it may seek to execute for the sale or lease of power or power privileges covering a period of more than one year shall be subject to the approval of the Secretary of the Interior.

Twelfth: The proper officers or agents of the Association shall have full and free access at all reasonable times to the project books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the project, with the right at any time during office hours, to make copies of and from the same or any of them. The proper representatives of the United States shall have similar rights in respect to the books and records of the Association relating to the project and its care, operation and maintenance.

Thirteenth: The Secretary of the Interior reserves, and shall have the right, so far as the purport thereof may be consistent with the provisions of this agreement to make reasonable rules and regulations, and to add to or modify them, as may be proper and necessary to carry out the true intent and meaning of the law and this agreement.

Fourteenth: Nothing in this agreement shall be construed as affecting or interfering with the right or authority of the Secretary of the Interior to withhold delivery of water to the project to an extent corresponding to the area for which construction or building charges, with penalties and interest, have not been paid to the United States, as may be required by law and by the terms of this agreement and the Association shall upon direc-

tion of the Secretary of the Interior withhold delivery of water in such cases.

Fifteenth: The Association will in every practicable way cooperate with the Secretary of the Interior in carrying out the provisions of Section 2 of the act of Congress of May 19, 1916 (39 Stat., 130), providing for water rights for 631 Salt River Indian allotments of 10 acres each, and will cause to be performed such work as may be deemed necessary by the Secretary of the Interior to carry into effect the provisions of said law. The expense of such work will be made by the United States.

Sixteenth: If at any time before the full repayment to the United States of the cost of said project, said project or any essential part thereof shall be injured or destroyed by public enemies of the United States, or if said project or any essential part thereof, should as a war measure be injured, destroyed or rendered useless by orders of the United States or its officers, then further repayment of such construction cost shall be suspended and postponed until such time as said project shall have been restored to its state of efficiency and capacity just prior to such injury or destruction.

If by reason of invasion or occupation by enemies to the United States of territory of the United States, the water users (the constituent members of the Association), shall be prevented from the use of said project, or an essential part thereof, then during any period of such prevention of use, the repayment to the United States of construction cost under the provisions of this agreement, shall be suspended and postponed until such time as such use can be safely and uninterruptedly resumed.

Seventeenth: All agreements made, or that may hereafter be made by any of the members of the Association under the "Public Notice" heretofore issued relating to said project to repay to the United States the cost of said project at a different rate per acre or otherwise, than that to be fixed by the Secretary of the Interior under the provisions of this agreement, are to be deemed to be

and they each and all, are hereby modified so that the cost of the construction agreed thereby to be repaid shall conform to that fixed by the Secretary of the Interior under the terms of this agreement.

Eighteenth: No member of or delegate to Congress or resident Commissioner after his election or appointment or either before or after he has qualified or during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing however herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat., 1109.)

IN WITNESS WHEREOF, The undersigned have hereunto subscribed their names and affixed their seals this 6th day of September, 1917.

WITNESS:
E. C. Bradley (Sgd)
E. C. Finney (Sgd)
(Seal)

WITNESS:
Adah C. Troutman (Sgd)
A. B. Landreene (Sgd)
(Sgd) Alexander T. Vogelsang
Acting Secretary of the Interior for and on behalf of the United States of America PARTY OF THE FIRST PART.

SALT RIVER VALLEY WATER USERS' ASSOCIATION
John P. Orme (Sgd)
President
Chas. A. Vanderveer (Sgd)
Secretary

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DEC 23 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 792

CITY OF MESA, a municipal corporation,

Petitioner,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

JENNINGS, STROUSS, SALMON & TRASK
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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF MESA, a municipal corporation,

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v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This is an action in which the City of Mesa, a municipal corporation of the State of Arizona, attempted by eminent domain to acquire part of the electrical plant and system of the Salt River Project Agricultural Improvement and Power District. In the trial court, the United States of America filed a representation of interest, arguing that the action must be dismissed for failure to join the United States as an indispensable party. The

respondent had earlier filed a motion to dismiss for lack of jurisdiction on the ground, among others, that the United States was an indispensable party. This motion was denied but reargued after the United States had filed its representation of interest. The trial court dismissed for failure to join the United States as an indispensable party. On appeal the Arizona Supreme Court affirmed the dismissal on the ground that the property sought to be condemned was property in which the United States had an interest and that the United States was, therefore, an indispensable party.

The Court also held that to permit the City to condemn portions of the integrated system of the Salt River Project would be to derogate from the congressional purpose in establishing the Salt River Project as a federal reclamation project.

BACKGROUND STATEMENT

The correctness of the holdings of the lower courts can be best appreciated against the background of a brief history of the Salt River Project. The Salt River Valley Water Users' Association (hereinafter, the Association) is a corporation which was created under the laws of the Territory of Arizona on February 9, 1903, for the purpose of entering into an agreement with the United States of America under the provisions of the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. § 371 et seq, thereby availing the shareholders of the corporation of the benefits of the Reclamation Act. Such an agreement was entered into on June 25, 1904, and the Salt River Project became the first project organized under the authority of the Reclamation Act. Pursuant to this agreement the United States constructed what is now known as the Theodore Roosevelt Dam, and various water distribution and power facilities were constructed or otherwise acquired. From the time of the formation of the Project until 1917, its ownership, operation, and control were retained by the

United States, acting through the United States Reclamation Service.

On September 6, 1917, the United States and the Association entered into a contract (Pet. App. C) by which the United States agreed that it would:

> turn over to and vest in the said Association, the care, operation and maintenance of the irrigation works known as the Salt River Project, situate in the Counties of Gila, Pinal and Maricopa, consisting generally of the Roosevelt Dam, the Granite Reef Dam, irrigation canals, laterals and ditches, and other conduits, gates, pipes, power plants, power houses, buildings and other structures of every kind, transmission, telegraph and telephone lines . . . with such right of possession of all thereof, as shall be necessary or convenient for the care, operation and maintenance of said project by said Association, as hereinafter provided. (Article Second, 1917 Agreement, Pet. App. C2)

It was also provided that the Association should have the right to all of the rents, issues, profits, revenue and income from the Project from the date of its taking over the care, operation and maintenance. *Ibid.*

The purpose and function of the Salt River Project after its care, maintenance and operation were turned over to the Association were precisely the same as they had been before: the effectuation of the basic objectives of the Reclamation Act. Thus, the Association agreed that it would care for, operate, and maintain the Project's system in full compliance with the Reclamation law. The Secretary of the Interior reserved the right to terminate the Agreement by written notice "in case the Association fails to carry out the provisions of law relating thereto, or of this agreement, in their true intent and meaning. . . ." (Article Ninth, 1917 Agreement, Pet. App. C7) All contracts for the sale or lease of power or power privileges covering a period of more than one year were made subject to the approval of the Secretary of the Interior,

and the United States was given the right to inspect the books and records of the Association with regard to the care, operation, and maintenance of the Project. (Article Eleventh, Pet. App. C8) A narrow but specific obligation which the Association undertook was to provide "for water rights for 631 Salt River Indian allotments of 10 acres each. . . ." (Article Fifteenth, Pet. App. C9)

The Association also obligated itself to repay to the United States the cost of the construction of the Project, without interest. (Article Fourth, Pet. App. C3-C5) As the Arizona Supreme Court pointed out, however, this obligation to repay the construction cost was only one of many obligations undertaken by the Association, and the United States retained many interests of a continuing nature in the contract other than its interest in the repayment of the construction cost. The purpose of the Salt River Project after the 1917 Agreement remained the same: "to carry out the provisions of [the reclamation] law. . . ." (Article Ninth, Pet. App. C7) Only the agent charged with the effectuation of that purpose had changed. And it was expressly provided that if the Association failed to carry out the provisions of the Reclamation Law, management of the Project would revert to the United States. *Ibid.*

On March 22, 1937, the Association entered into an agreement with the respondent, Salt River Project Agricultural Improvement and Power District (hereinafter, the District), transferring to the District all of the Association's properties, including all water and power rights, franchises and privileges, and revenues therefrom. The agreement recited the earlier Association-United States contracts and referred to the works and properties comprising the Salt River Project as "vested in the United States" under the Reclamation Act.

The United States approved the 1937 agreement between the Association and the District "upon the express condition that the

District agrees to accept title to the property conveyed subject to any and all provisions of all contracts between the United States and the Association and that the District will faithfully and promptly comply with any order directed to the Association by the United States pursuant to said contracts. . . ." This condition was formally accepted by both the Association and the District on May 19, 1937. In September of 1949, the agreement between the Association and the District was amended to provide that the District would assume the maintenance and operation of the electric power system from the Association.[1]

Therefore, the relationship between the District and the United States, and the continuing interest of the United States in the District and its properties, including those at issue here, are determined by the 1917 agreement between the United States and the Association.

REASONS FOR DENYING THE WRIT

The nub of the petitioner's contention before this Court, as in the courts below, is that the only interest of the United States in the Salt River Project is its financial interest in seeing that the original cost of construction is repaid.

The petition for certiorari should be denied for three separate and independently sufficient reasons:

1. The Arizona Supreme Court has determined that the United States is an indispensable party. The question of who is an indispensable party to an eminent domain action in an Arizona state court is solely a question of Arizona law. Therefore, the holding of the lower court rests upon an independent state ground.

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[1]All of the agreements referred to here were before the lower court and are part of the record. (See pocket part, Abstract of Record)

2. The property sought to be condemned either belongs to the United States or is property in which the United States has an interest. Whether the United States holds legal title to all of the property in question or whether title to some of such property is held by the District in trust for the United States can only be determined by a construction of the contracts which were before the Court and by the interpretation of the Reclamation Act. In either case, the title or interest of the United States may not be determined in its absence.

3. More important even than the property interest of the United States, is its interest in maintaining the integrity of the Salt River Project as a federal reclamation project; the Supremacy Clause of the United States Constitution therefore proscribes any attempt by the petitioner or any other state entity to carve off whatever portions of this integrated Reclamation Project the petitioner would like to have for itself.

These three reasons will be discussed in order.

1. *There is an Independent State Ground.* The nature of the federal interest in the properties here sought to be condemned will be discussed in the two succeeding sections. As will be shown, that interest is such that the doctrine of sovereign immunity and the Supremacy Clause of the United States Constitution preclude the properties from being taken by a political subdivision of the State. Regardless of the extent of the interest of the United States as a matter of federal law, however, the Arizona Supreme Court has held in this case that the interest of the United States is sufficient to constitute the United States an indispensable party to a state eminent domain action involving the District's facilities.

The determination of indispensable parties in an eminent domain proceeding brought in an Arizona state court is solely a matter of Arizona law. See Arizona Revised Statutes §12-1117. The holding of the lower court therefore rests upon an independ-

ent state ground, and under well settled authority, review by this Court will be denied. *Black v. Cutter Laboratories,* 351 U.S. 292 (1965); *Herb v. Pitcairn,* 325 U.S. 17 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 220 (1935).

2. *Title is in the United States.* The petitioner contends that "it is not reasonable to conclude that the Congress intended that the landowners were to repay the cost of the project to the Government and yet were not to become the owners thereof—at least as to the major part thereof." (Pet. p. 12) The respondent takes a different view concerning what is a reasonable conclusion as to Congress' intent.

The Reclamation Act plainly draws a distinction between title to reclamation project properties, and their care, maintenance and operation.[2] By the 1917 Agreement, the United States relinquished only "the care, operation and maintenance of the irrigation works known as the Salt River Project . . ."; (Pet. App. C2)

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[2]Section 6 of the Reclamation Act of June 17, 1902, provides as follows:

That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided,* That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. 32 Stat. 389, 43 U.S.C. §§ 491, 498.

it did not release, and has never released the title.[3] In the 1917 Agreement, the Secretary of Interior also retained the right to terminate the Agreement and resume the management, operation and control of the Project "in case the Association fails to carry out the provisions of law relating thereto, or of this Agreement . . . ." (Pet. App. C7) In light of the integrated nature of the Salt River Project's water conservation and electric generation and distribution facilities, *Uhlmann v. Wren*, 97 Ariz. 366, 401 P.2d 113 (1965), it is inconceivable that the 1917 Agreement contemplated the resumption of management and control only of the facilities as they existed at the time of the 1917 Agreement.

Therefore, whether it be characterized as title, or as the interest of one for whom properties are held in trust, the United States has—and will continue to have, until relinquished by the United States—a property interest in all of the facilities of the Salt River Project.

This conclusion—that the property interest of the United States extends to post-1917 Agreement properties—is clearly that which has been adopted and followed by Congress. In 1922, then United States Representative Carl Hayden quoted in a report of the House Committee on Irrigation of Arid Lands a letter from the Association stating that:

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[3]It is true, as the petitioner asserts, that this Court pointed out in *Swigart v. Baker*, 229 U.S. 187 (1913), that the Reclamation Act established a revolving fund which utilizes moneys from the sale of public lands to construct reclamation projects. Moneys used to finance such projects would be repaid into the fund and used for other projects. This Court did not say, however, that upon repayment, title passed from the United States; the Act expressly provides otherwise. The scheme contemplated by the Act was not one which merely provided interim financing until the landowners could purchase all interest in the project; rather the United States retained a continuing property interest, the cost of which, as this Court stated in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958), "will never be recovered in full."

Under our contract with the Government any new development or extension of our present power system automatically becomes the property of the United States Government; to be operated for the benefit of the project it is true, but nevertheless the title will always remain in the United States Government. H.R. Rep. No. 1,000, 67th Cong., 2d Sess. p. 2 (1922).

Congressman Hayden's report for the Committee concludes as follows:

> Your committee is of the opinion that the enactment of this bill, as amended, will, under proper safeguards, permit the development of additional hydroelectric power in connection with the Salt River project. The title to all such improvements remains in the United States and, without appropriations by Congress, this development will materially increase the security for the sums due to the United States for the construction of the project. *Id.* at p. 6.

The Report of the Senate Committee on Irrigation and Reclamation by Senator Cameron also refers to Mr. Hayden's Report, and concludes that "the title to all such improvements remains in the United States. . . ." S. Rep. No. 826, 67th Cong., 2d Sess. p. 2 (1922).

The 1937 Agreement between the Association and the District, which was approved by the United States, contains the following recital:

> WHEREAS, the Association, in furtherance of the objects for which it was incorporated, has expended or undertaken the payment of the following amounts for the construction by the United States or by the Association with the approval of the United States, upon the lands of the United States, without or within the boundaries of the Association, and for the equipment of storage dams, diversion dams, power plants, distribution and communication lines, roads, bridges, power and irrigation canals, laterals, ditches, pumping plants, pipe lines, and

other properties and facilities, *all of which are owned by the United States,* to-wit: (Emphasis added)

The 1937 Agreement also contains the following covenant by the District:

> 7. The District agrees that it will hold title to all properties conveyed or assigned to it under the provisions of Paragraph 2 of this Agreement, for the use and benefit of the United States, insofar as the United States may have an interest therein under the Reclamation Act and its amendments, and subject to disposition of such interest by order of the Secretary of the Interior of the United States, or other officer designated thereto by the Act of Congress known as the Reclamation Act, or acts amendatory thereof.

Therefore, twenty years after the Agreement between the Association and the United States—during which twenty year period many additional facilities were constructed—and almost thirty years prior to the institution of this condemnation action, and therefore not interpretable as a self-serving statement, all of the parties involved, including the United States, the District and the Association, regarded the United States as having a property interest in all of the Salt River Project properties. No distinction was drawn between pre-1917 and post-1917 properties.

The Arizona Courts have long recognized the continuing property interest of the United States in the properties of the District. In *Uhlmann v. Wren,* 97 Ariz. 366, 401 P.2d 113 (1965), for example, the District's statutory authority to condemn certain lands was challenged "because the District will hold the property in trust for the United States Government." 97 Ariz. at 383. The Arizona Court disagreed with the conclusion, but did not reject the premise—that the United States would have an interest in the property to be condemned. See also *Reichenberger v. Salt River Project Agricultural Improvement and Power District,* 50 Ariz. 144, 70 P.2d 452 (1937).

In short, the petitioner's assumption that the property interest of the United States in the Salt River Project terminated when the original construction cost was repaid is at odds with the purpose and the express language of the Reclamation Act; with relevant legislative history statements; with the 1937 Agreement involving the United States, the District, and the Association; and with the view that has consistently been taken by the Arizona Supreme Court. The United States now has—and will continue to have until relinquished by Congress—a property interest in the facilities at issue here. "Under the decisions of this Court, a judicial proceeding against property in which the Government has an interest is a suit against the United States which cannot be maintained without its consent." *United States v. Brosnan*, 363 U.S. 237, 250 (1960).

3. *Federal Interest in This Federal Reclamation Project.* Even more important than its property interest is the interest of the United States in maintaining the integrity of the Salt River Project Agricultural Improvement and Power District as the agent charged with the implementation of the Salt River Project as a federal reclamation project. The ultimate purpose, as prescribed by Congressional directive, of this and other federal reclamation projects, is to develop the public domain through the conservation and

distribution of water and the reclamation of arid lands.[4] The achievement of this end, by nature, involves a continuing process which is carried out by the District as agent for the United States.

The program remains, however, a federal program, and the objectives are those which were established by Congress. All contracts for the sale or lease of power or power privileges covering a period of more than one year are subject to the approval of the Secretary of Interior. (Pet. App. C8) The Association is obligated to keep records of water deliveries and of crops raised under the Project "as well as such other records as are appropriate to the interests of the Project as a whole." (Pet. App. C7) Similarly, the books and records of the respondent "relating to the project and its care, operation and maintenance" must remain available for inspection by representatives of the United States. (Pet. App. C8)

The facilities sought to be condemned here are part of the District's electric distribution system. The sale of electricity by the

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[4] S. Rep. No. 1468, 57th Cong., 1st Sess. (1902) pp. 16-17, contains the following statement by President Theodore Roosevelt as to the purpose of the proposed reclamation law:

> The majority of the committee are of the opinion that an imperative duty devolves upon the American Congress to lend assistance to the development of the great arid and semiarid portion of our country now but sparsely settled, but capable when fully developed of maintaining a large and prosperous population. In this territory must be found homes for the sons of the farmers of the Eastern and Middle states who may desire to take Horace Greeley's advice to 'Go West and grow up with the country.' In this region lies the best and most hopeful field for an increased market for American manufacturers, not only among those who shall occupy the irrigated farms, but also among the great mining and urban populations which will be established there.
>
> To aid in the reclamation of the desert and in establishing there a home-owning population will not only vastly increase the strength and prosperity of the entire nation, but is a duty which the government cannot escape, which is paramount in importance to every other duty now laid upon the American People.

District exists solely for the purpose of providing sufficient revenues to make the Project's irrigation and conservation activities economically feasible. As the Arizona Supreme Court pointed out in *Uhlmann v. Wren,* 97 Ariz. 366, 383, 401 P.2d 113 (1965), the development and sale of electric power by the District is "an incidental phase of reclamation, not a primary or independent end in itself." The electric generation and distribution system and the water storage and delivery system of the Project are, therefore, integrated, inter-dependent parts of a single whole, the one providing the funds to make the other economically feasible. *Uhlmann v. Wren, supra.*

This Court has held that "the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way." *James Stewart & Co. Inc. v. Sadrakula,* 309 U.S. 94, 103-104 (1940).[5]

Also, in *Land v. Dollar,* 330 U.S. 731, 738 (1947), relied upon by the petitioner, this Court stated as follows:

> But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. Ex parte State of New York, 256 U.S. 490, 500, 502, 41 S.Ct. 588, 590, 591, 65 L.Ed. 1057. If so, the suit is one against the sovereign. *Mine Safety Co. v. Forrestal, supra,* 326 U.S. at page 374, 66 S.Ct. at page 221.

The Arizona courts have correctly recognized the threat to important federal interests which would be posed by allowing a

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[5]See also, *United States v. Carmack,* 329 U.S. 230 (1946); *United States v. Georgia Public Service Commission,* 371 U.S. 285 (1963).

city to carve off at will whatever portions of a federal reclamation project it chose to take. If the lower courts had upheld such a power in the City of Mesa, this would have meant that any local state entity with powers of eminent domain could await the development of efficient integrated systems by federal reclamation projects, and then take whatever portion of the facilities constituting part of the integrated whole the condemning state entity wanted. Presumably, the facilities taken would, as in this case, be those located in high density population centers possessing the greatest revenue producing potential.

In a closely related context, two state courts have held that state political subdivisions having eminent domain powers cannot condemn parts of electric distribution systems of electric cooperatives financed under the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. § 901-14. *Public Utility District No. 1 v. Inland Power & Light Co.*, 64 Wash. 2d 122, 390 P.2d 690 (1964); *City of Fairbanks v. Electric Distribution System*, 413 P.2d 165 (Alaska 1966). In the *City of Fairbanks case*, the Alaska Supreme Court observed as follows:

> If Golden Valley is deprived of its facilities in the profitable areas, then the federal policy of providing electrical services for rural areas might well be frustrated, because the service area left to Golden Valley after removing the cream of the consumers of electrical services would be uneconomic and not self sustaining.
>
> In these circumstances we believe that the United States has an interest in this litigation that would be adversely affected by the judgment condemning the electric distribution facilities in the Island Homes Subdivision. It is an interest that would not be satisfied merely by repayment from the condemnation proceeds of the pro tanto portion of the money the United

States has loaned to Golden Valley.[6] The interest of the United States is not merely that of a money lender who expects repayment of its loan with interest. The interest of the United States is in seeing to it that Golden Valley is able to continue to provide electrical services at reasonable rates to the rural areas it has undertaken to serve. This it may not be able to do if the cream of its consumers of electrical energy in the densely populated areas is skimmed off by another utility, such as the City of Fairbanks. 413 P.2d at 167-168.

In *Public Utility District No. 1 v. Inland Power & Light Co., supra,* the Washington Supreme Court observed that "Inland's purpose is to implement the rural electrification program, i.e., to bring the benefits of electrification and telephone service to sparsely populated and remote areas that were not served by existing public utility companies." 390 P.2d at 691. The Court therefore concluded that: "A survey of the loan contracts, mortgages and the Rural Electrification Act leads to only one conclusion: The United States has a substantial interest in the properties in Pend Oreille County which the District seeks to condemn." *Ibid.*

There is no conflict between the *Inland Power* and *City of Fairbanks* cases, on the one hand, and *Central Louisiana Elec. Company v. Rural Electrification Administration,* 236 F. Supp. 271 (W.D. La. 1964), on the other. *Inland Power & Light Co.* and *City of Fairbanks* involved attempts to condemn facilities belonging to REA financed cooperatives. The *Central Louisiana Electric Company* was not a condemnation action; it was a suit to enjoin the consummation of a loan by REA on the ground that the proposed loan was outside the statutory authority of the

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[6]Significantly, in those instances in which the only interest of the United States is a financial interest, Congress has given its consent to be joined in a condemnation action involving property on which the United States has or claims a mortgage or other lien. See Public Law 89-719, 80 Stat. 1147-1148 (1966).

defendant officers and that the actions of the officers making the loan would be unconstitutional. The propriety of injunctions against individual governmental officers under such circumstances is of course well settled. *Larson v. Domestic & Commerce Corp.*, 337 U.S. 682 (1949).

Therefore, while it is technically true, as the petitioner states, that *Central Louisiana Electric Co.* "in a somewhat different legal and fact situation has rejected the plea of sovereign immunity as barring 'the suit,' " (Petition, p. 18) *"the suit"* in *Central Louisiana Electric Co.* was not a condemnation action, and the holding was in no way inconsistent with those of the Washington and Alaska Courts in the *Inland Power & Light Company* and *City of Fairbanks* cases.

THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The Petititon cites and discusses at pages 16-18 decisions by this Court which the petitioner regards as relevant to one aspect of the lower Court's holding, the sovereign immunity of the United States. Even if these decisions could be interpreted as removing the sovereign immunity bar from this case, only one of the three reasons discussed above why certiorari must be denied—that which rests upon the property interest of the United States—would be affected.

Moreover, the cited cases do not have the relevance attached to them by the petitioner. Their only real relevance is that they show that Congress may waive its immunity where it chooses to do so. *In Federal Land Bank v. Priddy*, 295 U.S. 229 (1935); *Federal Housing Administration v. Burr*, 309 U.S. 243 (1940); *Reconstruction Finance Corporation v. Menihan Corp.*, 312 U.S. 81 (1941); and *Dugan v. Rank*, 372 U.S. 609 (1963), Congress expressly gave its consent to "sue and be sued" in the particular

contexts there involved. In other instances, while the consent was not express, it was found to be implicit. *Sloan Shipyards Corp. v. United States Shipping Board,* 258 U.S. 549 (1922); *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381 (1939).

Here, on the other hand, Congress not only has not waived its immunity from condemnation of reclamation project properties; it has expressly provided that title to these properties shall remain in the United States until relinquished by Congress.

Even without the Congressional waiver which the Court found, the cases cited by the petitioner do not present the same substantive problem as the instant case. Most of the cases cited by the petitioner involved corporations created by the United States Government for the purpose of carrying out certain governmental programs. The question involved in those cases was whether such corporations inherit from the United States blanket immunity from suit. Such is not the issue here. The respondent has never contended, and the Arizona Supreme Court has never held, that the District enjoys a general immunity from suit.[7] The relevant immunity in this case is not one which the District claims to have inherited from the United States; it is, rather, the immunity of the United States itself. Unlike any case cited by the petitioner, this action involves an attempt to condemn property the title to which is in the United States. The decision of the lower court does not rest upon any blanket immunity from suit enjoyed by the District, but upon the simple principle that lands in which the United States has a property interest may not be taken without joining the United States as a party.

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[7]Indeed, the consistent assumption of both the respondent and the Arizona Courts has been that the District is liable both in contract (*Nyberg v. Salt River Project Agricultural Improvement and Power District,* 91 Ariz. 397, 372 P.2d 727 (1962), and in tort. *Peterson v. Salt River Project Agricultural Improvement and Power District,* 96 Ariz. 1, 391 P.2d 567 (1964).

In *Land v. Dollar*, 330 U.S. 731 (1947), cited by the petitioner, the plaintiffs alleged that certain shares of stock were unlawfully in the possession of the United States Maritime Commission. The Court held that where the right to possession and enjoyment of property is itself in dispute, the issue of who is entitled to the property may be resolved without violating the sovereign immunity rule. The holding of the lower court here is perfectly consistent with *Land v. Dollar*. In this case, the Arizona Court simply held that the documents which were properly before it, including the Reclamation Act, the agreements between the United States and the respondent or its predecessors, and the statements in the reports by Representative Hayden and Senator Cameron, disclosed that, as a matter of law, the United States has a substantial interest in these properties, an interest of which it cannot be deprived in its absence.

CONCLUSION

The Congress of the United States has made careful provision for preservation of the important federal interest in the Salt River Valley Reclamation Project. This interest has been correctly recognized and upheld by both the trial court and the Arizona Supreme Court. The federal interest having been protected, there is no need for further review by this Court. We respectfully submit that the Petition for Ceritorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

OCTOBER TERM 1966

No. 792

CITY OF MESA, a municipal corporation,

Petitioner,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

Petitioner will not reargue or reassert matters then and now relied upon by Petitioner as justifying this Petition which we believe were adequately stated for Petition purposes in its Petition. Certain claims made by Respondent justify a brief reply.

I

"Respondent's General Immunity from Suit"

City, in support of its claim that there is a real public interest in the question as to the soundness of the decision of the Arizona Supreme Court interpreting and applying federal law, pointed out

that the decision puts all assets of what is in fact a large electric public utility serving over 130,000 customers, with a bonded indebtedness of over $110,000,000, with electric revenues of over $41,000,000 in 1965 beyond the reach of the process of *any Court*. An injured party, be the claim for personal injury or business wrong, can only look to Congress and a private relief bill for his or its damages since no property of the District may be seized absent the consent of the United States.

City also pointed out that this major public utility is likewise freed from effective regulation of and control over its rates and charges for utility service by state agency or judicial supervision. The Constitution of Arizona, Article XV, exempts municipal corporations from supervision by the Arizona Corporation Commission. The Arizona Supreme Court in *City of Phoenix v. Wright,* 52 Ariz. 227, 80 P.2d 390, confirmed this exemption. But in *Kasun v. City of Phoenix,* 54 Ariz. 470, 97 P.2d 210, the Arizona Supreme Court recognized that the Arizona Legislature can supervise, or provide for the supervision of, rates of municipalities, and in *Arizona Corporation Commission v. Mountain States T. & T. Co.,* 71 Ariz. 404, 228 P.2d 749, the Arizona Court recognized the power of a court of equity to supervise the reasonableness of rates charged by a public utility or fixed for it by a regulatory body (but not fix rates). In *Town of Wickenburg v. Sabin,* 68 Ariz. 75, 200 P.2d 342, the Arizona Supreme Court ruled that when a municipal corporation becomes a public utility it becomes subject to supervision by a court of equity the same as a private utility as to discriminatory practices and as to the reasonableness of all of its dealings with the public. Certainly the rationale of the decision below forecloses even these modest restraints upon the utility activity of this municipal corporation suddenly draped with the cloak of sovereign immunity.

Respondent's only answer to the complete discharge from needed restraints imposed by local laws which the decision below affords Respondent is "The respondent has never contended, and

the Arizona Supreme Court has never held, that the District enjoys a general immunity from suit." (P. 17 Respondent's Brief). In support of this statement Respondent by footnote 7 cites two Arizona cases, *Peterson v. Salt River etc. District,* 96 Ariz 1, 391 P.2d 567 (1964) and *Nyberg v. Salt River etc. District,* 91 Ariz. 397, 372 P.2d 727 (1962).

Both of these cases were decided prior to the decision in this case and in neither of the cases was the question here decided raised. Both were decided by the same court which decided the first *City of Mesa* case, 92 Ariz. 91, 373 P.2d 722 (1962) in which case the Court held

> "The authority of the City (Mesa) to acquire by condemnation the interests of the District is clear * * " (P. 104, 92 Ariz., P. 731, 373 P.2d),

a holding which it ignored in this case, except to note that Petitioner (Appellant) relied upon the holding.

Plainly with the announcement of this decision by the Arizona Supreme Court "a new day dawned" for the District insofar as its amenability to the laws and courts of Arizona, federal and state, is concerned.

The state itself under this decision may not cross a District right of way or interfere with other District property in building roads except with its permission, since no court may entertain a condemnation action even on suit of the state which itself made possible the organization of the District. Certainly no city can enforce zoning requirements as to underground installation of wires and similar regulations even in the exercise of the state's police power.

The mischiefs which can spring from the misapplication of federal law by the court below cannot now be all foreseen, but plainly the whim of the District's governing body rather than legal restraints will limit or enlarge the area wherein such mischiefs will arise.

It is true, of course, that theoretically perhaps the District may

still be sued but certainly not effectively. The rationale of the decision below is that *all* property and assets of the District (and of every other federal reclamation project for that matter) may not be taken or interfered with by judicial or state action except with the consent of the United States.

While the ruling below simulated the form of a ruling upon a question of parties, its practical effect is to confer the sovereign immunity of the United States upon the District.

II

"Title is in the United States"

The 1917 agreement turned over "the care, operation and maintenance of the irrigation works" *as such works then existed.* Specifically the language used requiring maintenance of the "works" (Pet. C3) was "as the same is now, at its own cost and without cost to the United States." Changes in "said works" could not be made without the Secretary's written consent (Pet. C3) but "It may, however, construct additional works at its own cost without the necessity of procuring the assent of the Secretary * * * " Add to the foregoing the provision (Pet. C2) that "all the rents, issues, profits, revenue and income, including all income from power and power privileges growing out of or arising from the operation and maintenance of the project and every part thereof" * * * "from the time of the taking over of the care, operation and maintenance of said project * * * " by the Association should be had and received by the Association "to its own use and benefit" and the claim that all additions to the "works" made by the Association and the District from 1917 to 1966 with funds to which the United States had by contract released all interest or right is demonstrated as almost frivolous.

CONCLUSION

Much as Petitioner is tempted to attack *seriatim* Respondent's numerous other contentions, Petitioner knows this would involve

substantially restating arguments and authorities already once stated in its Petition and hence an unjustified waste of the Court's time.

Petitioner respectfully prays that the Writ issue.

Respectfully submitted,

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December 29, 1966